THE YEAR BOOK OF LEGAL STUDIES 1957

Date of publication: 27th June 1957.

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By

The Department of Legal Studies
Law College, Madras.

Volume I

PUBLISHED UNDER THE AUSPICES OF
THE DEPARTMENT OF LEGAL STUDIES
LAW COLLEGE MADRAS

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Director of Legal Studies, Madras State

MESSAGE

C. SUBRAMANIAM
MINISTER FOR FINANCE AND EDUCATION

FORT ST. GEORGE
MADRAS-9
MARCH 15, 1957.

I am glad to learn that the Director of Legal Studies is bringing out a Year Book of Legal Studies. In view of the concern expressed frequently regarding the need for the improvement of the standards of Legal Education, it is necessary to do everything possible to upgrade the quality. I hope and trust the Year Book of Legal Studies will serve a useful purpose in promoting this objective. I wish the venture every success.

C. SUBRAMANIAM

FOREWORD.

I am extremely happy to write a foreword to this new venture of the Department of Legal Studies, Law College, Madras, inspired by its able and enterprising Director Sri M. Anantanarayanan, I.C.S. It has always been a matter of regret to me that in spite of the high forensic qualities developed by eminent leaders of the Madras Bar, so little has been accomplished in the field of juristic studies and legal research. It is not for me to speculate on the reasons for this omission. Probably the absence of a personality with sufficient interest in this aspect and plenty of drive was one of the reasons. Now that we have such a person like Sri M. Anantanarayanan, there is every prospect of good work in this direction. In fairness I should also mention the pioneering work of Prof. C. H. Alexandrowicz of the University of Madras.

The Year Book of Legal Studies—and it is the first issue—is in furtherance of one of the functions and objects of the Department of Legal Studies, viz., the institution and promotion of research in Law. A look at its contents reveals the rich juristic fare it provides for the lawyer, the student of law and the intelligent common man. I particularly like the variety—States Reorganization and Kashmir, Ancient and Modern Jurisprudence and Indian Marriages under Private International Law, and so on.

I wish the enterprise every success. Without any hesitation and with confidence I commend the publication to academic and non-academic circles.

P. V. RAJAMANNAR,
Chief Justice of Madras.

March 28, 1957.

INTRODUCTION.

This is the first Year Book which is being issued by the Department of Legal Studies, the publication having been authorized by the Government. It is part of a planned attempt to upgrade the quality of Legal Education in the State, and the Year Book contains juristic and academic studies upon a variety of topics, contributed by members of the staff, and by distinguished outsiders who have been kind enough to respond to our request. I take this opportunity to thank these gentlemen, viz., Dr. C. H. Alexandrowicz, Professor of International Law and Constitutional Law in the University, Dr. Hamid Ali and Sri Alagiriswami, Secretary, Law Department, Government of Madras.

2. I need not emphasise that the true task of the Educator in Law is to stimulate thought upon First Principles; in order to do this, he must not merely be a scholar in his subject, but must himself be capable of Legal Research. Hence it is hoped that the staff will keep up this venture, and that it will become an annual feature of the Department.

3. We must express our deep sense of thankfulness to the Hon'ble the Chief Justice Sri P. V. Rajamannar and the Hon'ble the Minister for Education Sri C. Subramaniam for the Foreword and the Message that they have respectively contributed to the Year Book, which have both been a source of great encouragement to us.

M. ANANTANARAYANAN,
Director of Legal Studies.

THE YEAR BOOK OF LEGAL STUDIES.

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YEAR BOOK OF LEGAL STUDIES.

LEGAL PHILOSOPHY AND THE PROBLEM OF OBEDIENCE.

M. ANANTANARAYANAN.

The Crux of Jurisprudence

The central problem of Jurisprudence itself defines the subject, for the pre-legal question, "what is Law?" constitutes the very enquiry of which Jurisprudence is the attempted and extensive answer. As one writer puts it—"Jurisprudence is a particular method of study, not of the law of one country, but of the general notion of Law itself." [1] The varying Schools of Jurisprudence ought to be seen, not as mere expounders of rival hypotheses, but as upholding insights from different levels into the heart of the entity Law, all of them of great value in one or other sense, and complementary to each other in a synthetic perspective. Nor is any method of knowledge, whether descriptive and historical, or logical and analytic, the prerogative of a particular school. For instance, the writer already cited properly emphasises that John Austin ought not to be called the founder of the Analytical School, for the title itself is misleading "as it suggests that Analysis is the exclusive property of this School, instead of being (as it is) the universal method of Jurisprudence." [2] To the mature student of the future, the conflict between the Schools may well appear a historical accident, the contribution of value in each case being a partial insight into a problem which is intricate, multi-dimensional, and at once philosophical and sociological.

To a certain kind of intellect it might even appear that the problem is false. For Law exists as a structural order, whether we like it or not, and however it might

[1] Paton: "A Text-book of Jurisprudence" (1946), page 2.
[2] Paton: "A Text-book of Jurisprudence" (1946), page 4.

have evolved in the sociological process. Every society presents this feature of interaction between a set of abstract rules and the lives of the people comprising it, and it may be that we can do no more than trace these relationships, our task thus being strictly descriptive. But even so, the teleological approach "What is the end of Law? What purpose should it subserve?" would remain valid, and require to be answered. As Stammler pointed out, in a certain view Law is volitional, and so long as it has this characteristic, Law by definition would appear to exist to harmonize the purposes of individuals. Law is thus a group of social wills, itself definitively striving towards Justice. An *unjust law* is a failure to effect the purpose of Law, and criteria are therefore essential for valid judgments in this respect.[3] Every attempt to formulate a 'pure Science of Law' is foredoomed to failure, if by it is meant an exclusion of all purposive or sociological considerations, in the strict analytic presentation of what Law *is*. For Man lives by the future as well as the present, his prerogative is to be dissatisfied with every social instrument of which he is the creator. Again, even if we strictly segregate Law from every 'value' of its further evolution, this purely theoretical approach to its nature may not be the sole fruitful technique of study. As Roscoe Pound and those of the "Functional School' hold and believe, we may also learn of what Law truly is, by studying what it does.

In any event, Legal Philosophy in its widest sense, inclusive of all the schools and their modes of approach, is thus of profound significance today. For men would like to know more of the true nature of Law, not the less so because mere habit, custom and fear (sanctions) are no longer viewed as ethically sufficing factors for obedience. Also, Democracy presents its own acute problems, crystallising the need for a new *Ratio Legis*; the tyranny of a majority, of legal faddism, or of legislation inspired by passions of hatred, is not as remote

[3] *See* the illuminating study—"Stammler's Philosophy of Law" by M. Ginsberg in "Modern Theories of Law" (1933).

from actuality as some would like to imagine. In this context, the following passage from Dean Pound presents this issue, in words of maturity and wisdom that cannot be bettered[4]:—

"Philosophy of Law is raising its head throughout the world. We are asked to measure rules and doctrines and institutions and to guide the application of law by reference to the end of law and to think of them in terms of social utility. We are invited to subsume questions of law and of the application of law under the social ideal of the time and place. We are called upon to formulate the jural postulates of the civilization of the time and place and to measure law and the application of law thereby in order that law may further civilization and that the legal materials handed down with the civilization of the past may be made an instrument for maintaining and furthering the civilization of the present."

The Neo-Kantian Contribution

The purpose of this study is strictly suggestive. I desire to emphasise that the question *why* men obey the Law is of more abstract significance than is usually realized: for a study of it may lead us to the heart of the problem, the true nature of the man-made entity, Law. Even more revealingly, a study of *how* men disobey the law, if and when they choose to do so, may equally illumine the central theme; obedience to Law and disobedience of it, thus being facets of a single philosophical enquiry. To the first part of question, an answer is possible in terms of the Imperative School, or the neo-Austinians; it is possible in terms of the neo-Kantians, especially the followers of Kelsen; in terms of the Historical Realists, of the Functionalists, the Teleologists, and the 'Social engineers'. A neo-realist answer could even be attempted by applying the techniques of Psycho-analysis, upon this aspect, to

[4] "An Introduction to the Philosophy of Law" (1954), page 23.

average, law-abiding citizens. I venture to speculate that the data thus furnished may indicate that, beyond the explicable factors of habit, fears of social disapproval and of the 'sanctions' of Law itself, there is a relatively inexplicable interior acceptance of Law as an ethical approximation, a working social ideal. As regards the second question, which is the problem of disobedience, few thinkers have as yet realized that the facts present a principle of differentiation which is pregnant with meaning, relevant to our philosophical enquiry. In breaking the law, the individual criminal also *affirms* the normative order which is law, by his very evasions, his very precautions to escape the consequences. But this country in particular has contributed to the world the phenomenon of non-violent *mass Civil Disobedience*, which is a fresh insight linking up Positive Law with Natural Law concepts, in a manner that is exhilaratingly vital.

But, before proceeding to the main thesis, it is necessary to examine the neo-Kantian contribution to the nature of Law. The value of that contribution has been unfortunately rather diminished, by the singularly ambiguous position that Kelsen has come to occupy, in the history of juristic thought. His rigorous exclusion of Natural Law, and, indeed, of all 'value' judgments in the legal process, has led, as Prof. Lon Fuller points out, to a devitalization of his system by banishing any imperative of purpose. "Kelsen's whole system is an elaborate effort to deal with purposive arrangements as if they had no purpose." [5] Prof. Paton remarks—"It is curious to see that his (Kelsen's) impartiality in the conflicting social conflicts of today has led conservatives to call him a dangerous radical, and revolutionaries to dub him a reactionary." [6] Nevertheless, the objective student of juristic thought would have to admit that the neo-Kantians, however differing amongst themselves,

[5] "American Legal Philosophy at Mid-Century"—"Journal of Legal Education", Volume VI, No. 4, page 471.

[6] Paton: Jurisprudence, page 14.

as Kelsen and Stammler do seem at antipodes to each other with regard to the admission or exclusion of purpose in the legal process, have made perhaps the most vital contribution of recent times to the philosophy of Law, by the extension to Law itself, of the Kantian Method and Epistemology. This is a fact that has received very little appreciation, as far as the writer is aware, in the wide literature of modern Legal Philosophy. Actually, one receives the impression that American writers (perhaps from a dislike of abstractions) and Soviet jurists [7] alike scorn the metaphysical basis upon which the structures of both Kelsen and Stammler are erected, though a philosopher in the general sense, or a student of epistemology, would not hesitate to affirm the value of the Kantian contribution to modern thought in this respect.

What precisely is this metaphysical basis? It is set forth, ably and lucidly, by Dr. Lauterpacht in his paper on "Kelsen's Pure Science of Law" [8] in the following passage:—

"But he fully accepts and transplants to the domain of law the basis of Kant's method, namely, the view that knowledge is not merely a passive picture of the objective world, but that it creates its objects according to its inherent law from the material given by the senses. Kelsen's conception of law is such a creation . . . It is a product of a mental operation. It is a phenomenon in the category of essence (*das sollen*): as distinguished from the category of existence (*das sein*): which is an abstract way of saying that the Science of law is a branch of normative sciences as distinguished from natural sciences. . . . The legal rule itself is logically a hypothetical judgment. It says: if a person becomes responsible for a certain state of facts through commission or omission, compulsion shall be applied against him. There are in the legal rule two sets of

[7] Please see criticisms of Kelsen in "Soviet Legal Philosophy"—Translated by H. W. Babb, pages 421-422.

[8] "Modern Theories of Law", page 107.

facts: The legal cause and the legal effect. But the connexion between them is not one of cause and effect in natural Science. It is a normative connexion." The basis of the structure of norms, according to Kelsen, is the fundamental one (*Grundnorm*) that the Constitution shall be obeyed, which alone makes Law possible. But the reasons for this rule "are in themselves meta-legal." [2] Prof. Fuller has pointed out that this 'Basic Norm' is Kelsen's minimum concession to a concept of Natural Law.

The true value of the neo-Kantian analysis is now somewhat apparent. It is the insistence that Law is a denizen of 'Meaning-Nature' as much as Poetry, Music or Beauty, though Law may involve predictable consequences in 'Event-Nature' or the world of physical events. In 'Event-Nature' there is, or there appears to be, a cause-effect connexion between events, though even this, as Russel has shown, is subject to two somewhat startling modifications. Firstly, since the Quantum Theory and the development of Subatomic or Nuclear Physics, the Causal connexion is no more discernible in one sphere of phenomena. Secondly, even in the world of gross physical events, Causation is always an approximation, because an uncertain interval of time separates events. But this apart, in 'Meaning-Nature', the true connexion is Normative and not Causative. The failure to discern that Law is of 'Meaning-Nature', that it is a Normative structure of 'shall', where compulsion itself is but a mental concept, is the root imperfection of the Austinian analysis. Indeed, even Kelsen seems to fail, as a neo-Kantian. For how, otherwise, does he not realize that Law cannot be divorced from the human will to fulfilment, that men do not obey the Law because of a 'Basic Norm' (*Grund Norm*), which has all the artificiality of a mythical social contract, but because Law is a denizen of 'Meaning-Nature', and, dimly or

[2] Lauterpacht: "Kelsen's Pure Science of Law" in "Modern Theories of Law", page 107.

otherwise, they discern its relativity to purpose, to fulfilment in the verities of 'Meaning'? But, for the light shed on the nature of the problem by the Kantian method, we cannot be sufficiently grateful. But for this, we could not proceed beyond the blighting rigours of the Austinian analysis.

'The Dichotomy of Fact and Value': The True Problem of Obedience to Law

In the article already referred to, [10] Prof. Fuller discusses the 'Dichotomy of Fact and Value', and makes a penetrating criticism of Patterson's view that 'value judgments' cannot be derived from 'facts'. In the legal sphere, in particular, he observes that "The essential meaning of a legal rule lies in a purpose, or more commonly, in a congeries of purposes." Within the framework of this purpose, or set of related purposes, the sharp dichotomy between fact and evaluation cannot be maintained.[11] But, indeed, it is unnecessary to labour the point, once we grasp the true significance of Law as a normative structure, a denizen of 'Meaning-Nature'. It is only Kelsen's unfortunate attempt to evolve a 'pure science of law', divorced from purposes which are inherent to 'Meaning-Nature', that has led to the tragic misconception that Law is self-justified by legal 'facts'. Law, like a musical composition, is, in reality, a bundle of 'values', evolved or evolving. Apart from them, its 'facts' are unsignificant, precisely like an arbitrary succession of Notes in sound.

We are now in a position to view the problem of obedience to law, as an issue in Legal Philosophy, with a truer sense of perspective. The reason why men obey the Law, by and large, *has* something to do with the nature of Law itself. Law, of course, may be viewed, objectively and justifiably, as a network of "facts". It

[10] "American Legal Philosophy at Mid-Century"—"Journal of Legal Education", Volume VI, No. 4, page 469.

[11] "American Legal Philosophy at Mid-Century"—"Journal of Legal Education", Volume VI, No. 4, page 470.

is a 'fact' that these abstract rules govern the relationships of men, and that, if a man wilfully kills another, he causes a physical event, which is likely to set certain forces in motion. He may be traced, evidence of the crime gathered, and he may be hanged if legal agencies can prove his commission of the crime. But these 'facts' are, so to speak, inexplicable by themselves. The relation between them is not causal, as with natural laws, but one of attribution. Apart from the uncertainties which may supervene and prevent the Law having effect, the truth is that these relationships are normative, and man-made. Men accept them, because of a dim inner sense that Law has a teleological justification, not purely because of Habit and Fear, however strongly they may be operative in individual cases. Individual disobedience of law, throws only this light on the philosophical issue, that even the criminal *affirms* the normative structure by his very consciousness of the law, his evasions, his attempts to avoid its unpleasant sanctions, while profiting by his crime. This applies even to a false defence in a court of law trying him for the crime, as much as to a manufactured *alibi,* or to precautions adopted to evade discovery. But in non-violent *mass Civil Disobedience,* we do have a new phenomenon and concept. Positive Law is here challenged, by the light of the very truth that 'fact' and 'value' cannot be divorced in Law. This Disobedience affirms the 'Meaning-Nature' of law, as against the "given facts" of Positive Law.

Conclusion

To sum up—

(1) Law is a denizen of 'Meaning-Nature', though involving predictable consequences in 'Event-Nature'. Its relationships are, therefore, not of Causation, but Attribution, precisely as in other normative structures.

(2) The 'facts' of Law are never explicable in themselves, by its very character. 'The Dichotomy of Fact and Value' may apply to Physics or Astronomy,

but cannot be made applicable to Law, because the 'facts' of Law always involve the circular definition that 'Law is the law'; the teleological appraisal is hence inescapable.

(3) Obedience to law, again, on the part of most men in a given Society, is not merely 'a fact'. Its 'value' alone explains it, namely, acceptance of at least the possibility of a social fulfilment through law. While the criminal merely *affirms* the normative structure, even when he wantonly breaks the law, because of the protection that he adopts in self-interest, the Indian contribution of *mass Civil Disobedience* is a unique appeal from Positive Law to its veiled sources in the evolving ethical consciousness of men.

SOME LEGAL PROBLEMS CONNECTED WITH THE REORGANIZATION OF INDIA.

CHARLES HENRY ALEXANDROWICZ—ALEXANDER.

The purpose of these brief considerations is not to discuss constitutional questions of immediate practical importance but to draw the attention of lawyers to a few problems which emerge from the comparison of the original provisions of the Draft of the States Reorganization Bill, 1956, and the connected Proposals for the Amendment of the Constitution with the final provisions of the States Reorganization Act, 1956, and the Constitution (Seventh Amendment) Act, 1956. One of these is the problem of abolition of the classification of States into A, B and C. The Report of the States Reorganization Commission, 1955, made the following statement on the subject: 'The problem of abolishing the distinction between Part B States and Part A States would not present any serious difficulty. There are three factors, apart from certain minor transitory provisions of the Constitution, which distinguish the Part B States from Part A States: (*a*) certain agreements in consequence of their financial integration; (*b*) the general control vested in the Government of India by Article 371; and (*c*) the institution of the Rajpramukh.'[1] Referring to the first point the Commission expressed the view that the provisions of the above agreements could be revised and suitably adjusted.[2]

As to the second point the Commission stated that 'with the establishment of properly constituted legislatures in Part B States, the exercise of central control over these States has been gradually falling into desuetude.'[3] The reasons are quite obvious as the establishment of legislatures with executives responsible to them

[1] Report of the States Reorganization Commission (S.R.C.), paragraph 240.
[2] Report of the S.R.C., paragraph 240.
[3] Report of the S.R.C., paragraph 241.

brought Parliamentary government to States B which became less and less reconcilable with the interference of the Centre on the basis of Article 371. The Commission recalled the case of the Presidential intervention in connexion with Sri Raju's trial in the State of Mysore which ultimately resulted in the withdrawal of the directive by the President.[4] Moreover, the institution of advisers to State Governments appointed by the Centre had come to an end. Thus in the words of the Commission 'the provisions contained in Article 371 will no longer be required', the more so that the territorial complexion of States B would be radically affected by the Reorganization.[5]

Finally as to the Rajpramukhs, the Commission observed that their position as constitutional heads of States B is more or less the same as that of Governors in States A.[6] Considering the above and in view of the convention (in fieri or in esse) which makes the choice of the head of a local State from among residents of that State undesirable, the Commission recommended that the institution of Rajpramukhs who had deep-rooted associations with the territories concerned, should be abolished.[7] The above statements have been quoted in more detail to make it clear that the States Reorganization Commission definitely advised to do away with the classification of States into A and B as an obsolete conception and to eliminate it from the Constitution. The Commission also considered the further existence of States C as an anomaly and recommended that, with the exception of those which would become Union Territories, they should be merged into the larger neighbouring States.[8] If so, the need for any classification of States ceased to exist, and thus the Commission proposed the division of the component

[4] Report of the S.R.C., paragraph 241.
[5] Report of the S.R.C., paragraph 241.
[6] Report of the S.R.C., paragraph 242.
[7] Report of the S.R.C., paragraph 243-4.
[8] Report of the S.R.C., paragraph 268.

units of the Indian Federation into two categories: (*a*) "States" forming equal and primary federating units, and (*b*) Centrally administered territories.[9] Consequently, the Original Proposals for Amendment of the Constitution substituted for the classifying First Schedule of the Constitution a new First Schedule adopting the above two categories.[10] No reference to the change of the First Schedule was made in the original Draft of the States Reorganization Bill (Part II) as referred to the Legislatures of the States concerned (Article 3 of the Constitution).[11]

However, in the States Reorganization Bill, 1956, which followed the original Draft, a special article[12] was introduced in Part II relating to territorial changes which reads as follows: 'As from the appointed day, in the First Schedule to the Constitution, for Part A, Part B and Part C, the following Parts shall be substituted. . . .' Then followed the enumeration of States with the retention of the original classification (A, B and C), and the following States were classified or reclassified as States Part A: Andhra Pradesh, Assam, Bihar, Bombay, Kerala, Madhya Pradesh, Madras, Mysore, Orissa, Punjab, Rajasthan, Uttar Pradesh and West Bengal. This list was followed by the classification of the State of Jammu and Kashmir as a State Part B. The concluding Part C comprised the States of Delhi, Himachal Pradesh, Manipur, Tripura and the Laccadive Minicoy and Amindivi Islands. This was obviously a different solution from that adopted in the Proposals for Amendment of the Constitution. The States Reorganization Bill (including Article 12) was passed by both Houses of Parliament and received the assent of the

[9] Report of the S.R.C. (Summary of Conclusions and Recommendations, paragraph 267).

[10] Draft of the States Reorganization Bill and the connected Proposals for Amendment of the Constitution, pages 75-8.

[11] According to Article 4 (2) of the Constitution, no law effecting territorial changes (containing at the same time provisions for the Amendment of the First Schedule) shall be deemed to be an amendment of the Constitution for the purpose of Article 368.

[12] Article 12 of the States Reorganization Bill.

President on the 31st August 1956.[13] By that time the Proposals for Amendment had been embodied in the Constitution (Seventh Amendment) Bill, 1956, and the latter had been passed by both Houses of Parliament but had not yet become law, as it still needed ratification by not less than one-half of the States specified in Parts A and B of the First Schedule before it could receive the assent of the President.[14] Article 2 (2) of the Amendment Bill referred (similarly to Article 12 of the States Reorganization Act) to the amendment of the First Schedule and stated: 'For the First Schedule to the Constitution as amended by the States Reorganization Act, 1956, and the Bihar and West Bengal (Transfer of Territories) Act, 1956, the following Schedule shall be substituted. . . .' Then followed the same enumeration of States as adopted in the original Proposals for the Amendment of the Constitution, i.e., without the classification (A, B and C) provided in the States Reorganization Act. All States which were States A in the latter Act, as well as the State of Jammu and Kashmir (which is a State B in the Act) appeared simply as "the States". States C as enumerated in the Act appeared in the Amendment Bill as Union Territories with the addition of the Andaman and Nicobar Islands (previously in Part D). The Amendment Bill has been subsequently ratified and received the assent of the President and thus we are faced with two different conceptions of grouping and listing the States, one in the Reorganization Act and another, different one, in the Amendment Act. Whereas the second carries out the intentions of the States Reorganization Commission as adopted by all authorities and agencies concerned, the former retains the classification of States into A, B and C. Both Acts came into force at the same time, i.e., on the 1st November 1956, and thus while the First Schedule of the Reorganization Act became law at that date, it

[13] The *Gazette of India* Extraordinary, Part II, Section 1, S. No. 45.

[14] The whole Bill did not really call for ratification but only those provisions which correspond to matters enumerated in Article 368 (a-c).

had been at the same time superseded by the First Schedule of the Amendment Act which contains an express provision to this effect (Article 2, 2). There was and is, therefore, no conflict of provisions as the First Schedule of the Reorganization Act was at no time capable of implementation.

It seems *prima facie* that there is no problem of practical importance involved, but on second thought the whole legislative arrangement is not free from doubt. Let us again look at the Reorganization Act in its entirety. Apart from the First Schedule, a number of its provisions refer specifically to States A, B and C. For instance Article 14 which opens Part III relating to Zonal Councils states that " in this Part, unless the context otherwise requires, ' State ' does not include a Part C State." Article 15 includes in the Northern Zone the States of Punjab, Rajasthan and Jammu and Kashmir and the Part C States of Delhi and Himachal Pradesh. It also includes in the Eastern Zone (apart from Bihar, West Bengal, Orissa and Assam) the Part C States of Manipur and Tripura. Article 16 provides for the representation of Part C States in the Zonal Councils. There are other provisions referring to Part C States as for instance Articles 75, 94 and 120. The last article is concerned with the power of the appropriate Government to adapt laws in connexion with the Reorganization. It explains that the expression " Appropriate Government " means in relation to a matter enumerated in the Union List, the Central Government and " as respects any other law (i) in its application to a Part A State, the State Government and (ii) in its application to a Part C State the Central Government." Moreover, in defining the expression " new State ", the States Reorganization Act in Article 2 (1) defines it as " a Part A State formed by the provisions of Part II." Without going into further details one more provision draws our attention, i.e., that contained in Article 16 of the Reorganization Act, according to which in principle Ministers are nominated to Zonal Councils by the

Governor, but in case of the State of Jammu and Kashmir they are appointed by the Sadar-i-Riyasat who appears here separately as the Head of the only State B as classified in the First Schedule of the Reorganization Act.

The joint reading of all these provisions in both Acts may be capable of digestion by politicians who are supposed to possess the ability of absorbing and of making others absorb even irreconcilable ideas but to the ordinary legal "technician" who has the privilege of remaining in the less spectacular but not irrelevant sphere of logics, a number of problems are bound to occur. If the legislative intention since the dawn of the idea of Reorganization was to do away with the classification of States and if the realization of this idea was proposed by the States Reorganization Commission in its unequivocal recommendations, why did the draftsmen deviate from the idea in the Reorganization Act while giving effect to it in the Amendment Act? True, as stated above, the conflict has been removed by condemning the First Schedule in the Reorganization Act to death before its birth, but what about all references in the Act to States A or C which are law in force. The existence of States A or C in these provisions remains practically in the sphere of theory but where is the legal provision which converts the above references from the express text into meaningless abstracts? As to States C it may be argued that according to Article 130 of the Act, the Government of Part C States Act, 1951 has been definitely repealed with effect from the 1st November 1956. But it seems more difficult to explain away the detailed references to States A, unless we rely generally on legislative intention as evidenced by the joint reading of the Reorganization Act and the Amendment Act and by the First Schedule in the latter which has the last say in the matter.

Before concluding it may be asked whether we may presume the existence of any good reason for which this

rather complicated solution should have been chosen by the draftsmen of the Act. Was it convenient to give a separate status to the State of Jammu and Kashmir in the First Schedule of the Reorganization Act where it appears as the only State B? This would be hardly a satisfactory answer. Or is the reason that reorganization had to precede the final constitutional settlement and thus it was expedient to retain the classification of States while reorganization was in process? It seems that this answer is little convincing as the date of the 1st November 1956 provided a uniform watershed dividing two clearly distinguishable periods in Indian Federalism. Was it then a slip of the Draftsmen? This we are not allowed to presume. Perhaps the explanation lies in the fact that at the time when the States Reorganization Act became law on the 31st August 1956, the Amendment Act was only passed by both Houses of Parliament but was not yet ratified by the States. But as ratification according to Article 368 of the Constitution had to be effected by the Legislatures of not less than one-half of the States specified in *Parts A and B*, this classification had to be maintained to have ratification carried out by a minimum number of States A and B according to the letter of Article 368. This may not be a sufficient reason to explain our doubts, but it would at least thus share with other explanations that it contributed to the settlement of a problem of a purely transitory nature.

A similar problem arising in connexion with reorganization is that of delegation of legislative power. There are in fact several cases relating to delegation in the enactments on reorganization, at least one of them deserving our attention, again on theoretical rather than practical grounds. In particular Article 112 of the original Draft of the States Reorganization Bill (being now Article 120 in the Act) formulated the power of the Government to adapt laws in connexion with reorganization and stated that the above power exercisable by Order until the 1st November 1957 would extend to "such

adaptations and modifications of the law whether by way of repeal or amendment as may be necessary or expedient." As explained above this power was going to be exercised by the Central Government or the appropriate State Governments as the case may be. No corresponding provision was to be found in the Proposals for the Amendment of the Constitution. Thus, this was a case of delegation of legislative power based on a legislative enactment (without being supported by a constitutional provision) and the question arose whether it was within the limits of delegation as laid down by the Supreme Court of India. The answer is obviously in the negative if the Advisory Opinion of the Supreme Court and its subsequent decisions are allowed to speak. As generally known, the Supreme Court in its Advisory Opinion considered the delegation of the power of making adaptations and modifications of the law as *intra vires* but the power of repeal and amendment of any (corresponding) law as *ultra vires* and this position was maintained in a number of cases, thus laying down the law of delegation of legislative power in India.[15]

We must therefore come to the conclusion that had the Draft of the Reorganization Bill and the Proposals for the Amendment of the Constitution been passed in their original version, and had a case connected with Article 112 (now Article 120) come before the Supreme Court, the latter following the law as laid down by the majority of the judges, would have struck out as *ultra vires* the power of adapting the law by "repeal or amendment" contained in Article 112. Fortunately the draftsmen of the Amendment Bill later changed their mind and proposed the insertion of Article 372-A in the Constitution according to which the President has been empowered to "make such adaptations and modifications . . . of the law whether by way of repeal or amendment, as may be necessary or expedient. . . ."

[15] See *Constitutional Developments in India* by C. H. Alexandrowicz (Oxford University Press), 1957.

Moreover, legislatures received under clause 2 of Article 372-A, the power of "repealing or amending any law adapted or modified by the President." Thus if the President repeals or amends a law in connexion with the reorganization, the relevant Order is unimpeachable as it is based on the Constitution. In fact Article 372-A brings a substantial innovation into the law of delegation of legislative power by enacting an express constitutional provision relating to matters of repeal and amendment at least for the period of one year beginning with the 1st November 1956. A last word of caution should be uttered. In spite of Article 372-A, the power of the Government to repeal or amend the law according to Article 120 of the Reorganization Act is valid law and nothing can prevent the appropriate Government from taking advantage of this power. Would it not be wise if the Government abstained from doing so and left the business of repealing or amending the law to the President in order to avoid an undesirable conflict with the Supreme Court?

THE POWER OF THE GOVERNOR TO PROMULGATE AN ORDINANCE IN RESPECT OF MATTERS DEALT WITH UNDER ARTICLES 202 TO 206 OF THE CONSTITUTION.

A. ALAGIRISWAMI.

The holding of the General Elections this year at a time when normally the Legislatures of various States and Parliament would be holding their Budget Session makes the subject-matter of the present article a matter of some importance. It has been argued that the power of the Governor and the President to issue Ordinances can be taken advantage of, to avoid the necessity of having a Budget Session of the Legislature or at least of having a vote on account under the provisions of Article 206 of the Constitution. It is submitted that such a view cannot be sustained. It is true that under Article 213 of the Constitution, the power of the Governor to legislate by Ordinance is co-extensive with that of the Legislature. The only condition precedent for a valid exercise of that power is that the Legislature should not be in session. The Governor has to be satisfied that circumstances exist which render it necessary for him to take immediate action, though he is not bound to expound the reasons for promulgating an Ordinance or to prove those reasons affirmatively before a Court of Law. The existence of such a necessity is not a justiciable matter which the Courts could be called upon to determine by applying an objective test.[1] Nor have the words " immediate action " found in that Article any necessary connexion with any emergency. It is argued that according to Article 206, the Legislature of the State shall have power to authorize by law the withdrawal of moneys from the Consolidated Fund of the State for the purposes for which grants are made and as Article

[1] See *Lakshminarayan Das* v. *Province of Bihar*, S.C.J. 1950, page 32.

213 (2) lays down that an Ordinance promulgated under that Article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, it is open to have such a law enacted by promulgating an Ordinance. For the purpose of meeting this contention it is not necessary to argue that the absence of the word "Act" in Article 206 restricts the power of the Governor to promulgate an Ordinance for making any grant which will fall within the purview of that Article. It may also be argued that as there is no provision in the Constitution preventing the promulgation of an Ordinance for the purposes for which an Appropriation Act is passed, there is no objection to the Governor promulgating an Ordinance for that purpose.

It is submitted that such a view proceeds upon a superficial consideration of the provisions of the Constitution. It is not necessary for the purpose of supporting the other view to say that an Ordinance does not seem to have been intended to be promulgated in respect of matters for which an Appropriation Act could be considered necessary or that it has not been done so far. These two matters might not conclusively decide the question. But a consideration of the provisions of the Constitution regarding financial matters is in favour of the view that an Ordinance cannot be promulgated in respect of matters covered by Articles 202 to 206. In the case of an ordinary Bill, there are practically no preliminaries to be observed before it can be introduced into the Legislature and become an Act. There are of course certain matters in respect of which previous sanction or recommendation of the President or the Governor is necessary before a Bill can be introduced. But Article 255 provides that no Act of Parliament or of the Legislature of a State shall be invalid by reason only that some recommendation or previous sanction required by the Constitution was not given if assent to that Act is given by the Governor or the President, as the case may be. Let us now consider the provision of the Constitution as respects financial matters. Article

202 requires the Governor to cause to be laid before the Legislature a statement of the estimated receipts and expenditure of the State in respect of every financial year. Now it should be borne in mind that such a statement is an annual affair and can be well anticipated in advance. In respect of such a matter, it cannot be argued that the Legislature is not in session and that circumstances have arisen which render it necessary for the Governor to take immediate action. That is a matter which should have been taken note of and the Legislature should have been summoned and the failure of the Governor to summon the Legislature cannot be made an excuse to plead that circumstances have arisen which render it necessary for him to take immediate action. There is the further fact that in respect of financial matters, the Constitution itself has envisaged the possibility that even normally circumstances might arise which render it necessary for the Governor to take immediate action and has made other provisions for that purpose. Whereas in respect of matters other than financial no action can be taken by the Governor without being enabled to do so by law, the Constitution itself permits him to meet unforeseen expenditure, that is, if circumstances have arisen which render immediate action necessary, to make the necessary payment. Clause (2) of Article 267 enables the Legislature to establish a Contingency Fund to be placed at the disposal of the Governor to enable advances to be made by him for the purpose of meeting unforeseen expenditure pending the authorization of such expenditure by the Legislature by law under Article 205 or Article 206. Under clause (1) of Article 205, the Governor shall, if the amount authorized by any law made in accordance with the provisions of Article 204 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new

service not contemplated in the financial statement of that year, or *if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year,* cause to be presented before the Legislature another statement showing the estimated amount of that expenditure or a demand for such excess. It is, therefore, clear that the Constitution has provided not only for the Governor making an advance to meet unforeseen expenditure pending authorization of such expenditure but also for spending in excess of what has already been authorized by the Legislature on any service. It cannot be argued that the advances to be made under Article 267 (2) by the Governor can only be in pursuance of a law made under Article 206 because Article 267 clearly lays down that it is pending authorization by law under Article 205 or Article 206. It is, therefore, obvious that any plea in favour of an Ordinance for the purpose of either a grant under Article 206 or an Appropriation Bill under Article 204 cannot be sustained.

A Bill under Article 204 cannot be introduced till the annual financial statement has been laid before the Legislature and the estimates of expenditure in respect of items other than charged items are submitted in the form of demands for grants to the Legislative Assembly and the Legislative Assembly has assented to those demands. It is only after that a Bill can be introduced in the Assembly to provide for the appropriation out of the Consolidated Fund of the State of all moneys required to meet the grants so made by the Assembly as well as the charged items. The same procedure has to be followed under Article 205 even in cases where the amount authorized by law made under Article 202 is found to be insufficient or when a need has arisen for supplementary or additional expenditure upon some new service or if any money has been spent on any service during a financial year in excess of the amount granted for that service. Under Article 206, the Legislative

Assembly may *inter alia* make a grant in advance in respect of the estimated expenditure for a part of the financial year pending the completion of the procedure prescribed in Article 203 and the passing of the law in accordance with Article 204. There are thus three different contingencies contemplated and for which provision has been made by the Constitution:

(1) Payment from the Contingency Fund under Article 267 pending authorization under Article 205 or Article 206.

(2) Grants in advance under Article 206 pending completion of the procedure under Article 203 and the passing of the law in accordance with Article 204.

(3) Law in accordance with Article 204.

In the face of these elaborate provisions, it would not be possible to contend that circumstances have arisen which render it necessary for the Governor to take immediate action and so to promulgate an Ordinance. Those circumstances have been envisaged and provided for and those provisions should be resorted to rather than an Ordinance under Article 213.

Article 213 provides that the Governor should obtain the instructions from the President before promulgating an Ordinance if a Bill containing the same provisions would require the sanction of the President for its introduction into the Legislature or if an Act of the Legislature containing the same provisions would be invalid unless it had received the assent of the President. Thus provision has been made for cases where it may be considered necessary to promulgate an Ordinance in respect of matters in which either the previous sanction of the President or the subsequent assent of the President are necessary. Article 213 makes no provision for the procedure contemplated in Articles 202, 203 and 204. Article 198 makes elaborate provision in respect of Money Bills. It states that the Legislative Council is only to make a recommendation and if the Legislative

Assembly does not accept any of the recommendations of the Legislative Council, the Bill would be deemed to have been passed by both the Houses in the form in which it was passed by the Legislative Assembly. If it was intended that it should be possible to promulgate an Ordinance in respect of matters dealt with under Articles 202 to 206, Article 213 should have contained provisions regarding the laying of the annual financial statement before the Legislature, the passing of the grants, and should have provided that all this would be deemed to have been done if the Governor thought it necessary to promulgate an Ordinance in respect of these matters just as it now provides that in respect of previous sanction or subsequent assent of the President, instructions from the President for the promulgation of an Ordinance would be deemed to be sufficient. It would thus be obvious that matters covered by Articles 202 to 206 cannot be a proper subject for an Ordinance.

THE INDIAN CONSTITUTIONAL STRUCTURE.

N. ARUNACHALAM.

The nature of the Indian Constitutional Structure is a much misunderstood one. Whether this structure can fit into any particular category or not, the objective of it even has not yet been appreciated by some of the writers whose views are entitled to weight. Attempts have been made now and again by writers on an examination of some of the provisions of the Constitution to assign the Indian structure to sôme category or other, federal, *quasi*-federal and so on, or to say that it belongs to a class by itself. But, I submit that no serious thought has yet been bestowed on the objective of the Indian design. The objective remains worked out even in practical details by the provisions of the Constitution. *It is really the objective of the Constitution that has given it the shape.* Views have been expressed in some quarters having no relation to the relevant provisions of the Constitution. If in due time these views should take root, it is very likely that the objective of the Constitution is lost sight of even in a difficult situation. The aim of this discussion is to place before the reader certain background facts, draw attention to certain salient provisions of the Constitution and other relevant factors so that a correct picture of the Indian Constitutional Structure may emerge.

The Cabinet Mission Plan

Even as early as the year 1934, Pandit Jawaharlal Nehru, the present Prime Minister of India, thought in terms of a Constituent Assembly elected on the *widest franchise* to frame the Constitution of India. India was then undivided. Present India is past India *minus* Pakistan—a settled fact accepted by all Indians without mental reservation. Between the years 1934 and 1946

proposals, like the Sir Stafford Cripps proposals, Sir Tej Bahadur Sapru Committee proposals, Sir Maurice Gwyer plans, were made with a view to setting up a constitution-making body to draft the Constitution of India. But the composition of the Indian Constituent Assembly was settled in the year 1946 by the proposals of the Cabinet Mission that consisted of Lord Pethick Lawrence, Sir Stafford Cripps and Albert Victor Alexander. The Cabinet Mission issued as a result of the declaration of the British Prime Minister Attlee on the 15th March 1946, the object of which was to help India (undivided) to attain her freedom as speedily and fully as possible and to set up also the machinery for that purpose.

The Cabinet Mission came over to India and met the leaders of the political parties, Congress, Muslim League and others and made their proposals that are now known as the *Cabinet Mission Proposals* or *Plan*. These proposals rejected the Muslim League plan of partition of India. So far as this discussion is concerned, while the Cabinet Mission Proposals realized the importance of a Constituent Assembly elected on the widest possible franchise, in view of the urgency of the situation, the proposals suggested the election of Members of the Constituent Assembly, from the Provincial Legislative Assemblies of British India elected on a very limited franchise of 14 per cent under the Government of India Act, 1935, that was then in force—at the rate of a representative for a million of the population, on community basis such as Sikh, Muslim and General, that is, all those who are not Sikhs or Muslims.

British India was divided into three Sections A, B and C. Section A comprised Madras, Bombay, United Provinces, Bihar, Central Provinces and Orissa. Section B comprised the Punjab, North-West Frontier Province and Sind. Section C comprised Bengal and Assam. The Native Indian States were to come in later. The plan was that there was to be a preliminary meeting of the

three Sections at Delhi and after such preliminary meeting, the Sections were to break up to settle the Provincial Constitutions and also to consider whether a Group Constitution between the Centre and the Provinces in a Group or Section was necessary. The alignment of the provinces in the three sections indicate clearly that Muslim sentiment of the Muslim League Party was respected to the greatest extent possible consistent with the principle that there can be no division of India. If perhaps this plan had worked, a *contractual* federal structure of India comparable to the contractual federal structures of the United States and Australia may have emerged. But that was not to be.

The Muslim League Party Opposition

The determined opposition of the Muslim League Party to the Cabinet Mission Plan, the communal disorders and mass murders unleashed by the fissiparous forces at work compelled a revision of the plan and His Majesty's Government announced a plan of division of the country into India and Pakistan on the 3rd June 1947 which facilitated the setting up of a Constituent Assembly of their own by the separationists. The announcement was that political power would be transferred to these two authorities if a single authority was not going to be accepted by mutual agreement. His Majesty's Government plan soon matured into the *Indian Independence Act* of 1947 which conferred freedom on India and Pakistan on the 15th August 1947.

The Indian Constituent Assembly

The Indian Constituent Assembly went about its great task of framing a constitution for India in the background of the monstrosities of the tendencies in the country that preceded the partition. The great issue of the unity of the nation had to be faced and solved in the structure that was to be erected by the Constituent Assembly. The Congress Party was no doubt the dominating party in the Constituent Assembly. But there were also others who were eminent and respected

and qualified to discharge the great duty of Constitution-making. It was to a Committee composed of persons of such eminence and standing as Sir N. Gopalaswamy Ayyangar, Sir Alladi Krishnaswamy Aiyar, Mr. K. M. Munshi, Sir Saiyid Md. Saadulla, Mr. N. Madhava Rao, Mr. D. P. Khaitan, with Dr. B. R. Ambedkar as Chairman that the work of drafting the Indian Constitution was entrusted. Except Mr. K. M. Munshi, the other members of this Committee were not members of the Congress Party. The others were there because they were all not only qualified to do the onerous task entrusted to them but were also patriotic men with vision and imagination. I am making this point to show that the making of the Constitution was not treated by the dominant Congress Party as a party issue but as an issue affecting the nation as a whole. Therefore, it was, the task was rightly assigned to a Committee of eminently fit men distinguished for their character, standing and attainment. The draft of the Constitution that was supplied by this Committee was accepted finally by the Constituent Assembly with a few negligible changes as the Constitution of India that is now in force.

The Problem of the Makers of the Constitution

The problem that faced the makers of the Indian Constitution in the circumstances in which the country was actually placed after the terrible upheavals that had already taken place, was to secure the unity of the country as a whole. The design of the constitutional structure, therefore, had not only to take into account this basic idea of the unity of the country but also to have this idea permeated through the entirety of the structure that was to be fashioned. This, the makers of the constitution have done in a really admirable way. If this basic idea of the Constitution is lost sight of, the significance of the Indian Constitution will have been lost completely. Every one of the provisions of the Indian Constitution has been so made as to achieve this basic objective of unity of the country in any situation.

The Indian Constitution

The preamble to the Indian Constitution gives the country the status of a *Sovereign Democratic Republic* with the objectives set out therein, in addition to achieving the *unity* of the Nation. The objective of the unity of the Nation is not the expression of mere sentiment but seriously meant for as the very opening Article of the Constitution says,

"India, that is Bharat, shall be a Union of States".

Reading, therefore, the Preamble and Article 1 (1) together, it becomes clear that the emphasis in the Indian constitutional structure is on *Unity*. The other relevant provisions of the Constitution which will be noticed presently really work out the basic concept of *Unity*.

The United States

The preamble to the Constitution of the United States, 1789, says that the People of the United States in order to form a *more perfect Union* with the objectives stated therein ordained and established that Constitution. This Constitution resulted from the deliberations of the representatives of the thirteen original colonies that met in the Philadelphia Convention, particularly after the failure of the Confederate Constitution. "A more perfect Union" referred to in the preamble indicates that the Constitution that is framed is meant to bring about a more stable structure than the one that preceded it. The present Constitution of the United States represents a transition from the Confederate status to the Federal status of the American Union. There is no other way of understanding the significance of the words *more perfect Union* in the preamble to that Constitution.

The United States, A Federation

The United States is about the purest type of a federal structure embodying in itself the essential principles of Federalism. A federation comes into being

when States hitherto independent of each other voluntarily agree to form a single political structure, maintaining at the same time the internal independence of each one of the States. The independence of the State should remain whatever may be the degree of independence assured to it. As Prof. K. C. Wheare points out in his *Federal Government* "If there is no sphere of activity reserved for the constituent communities and forbidden to the Central Government, the Union is not federal but legislative or incorporative, as the Scots called it in 1707". The learned author points out further that from this basic principle of a federation two points emerge, namely, that (i) in order that the constituent units may have a sphere of real independence it will be necessary that they should for their own purposes and the centre for its own purposes should have a complete governmental organization—this duplication of institutions legislative, executive and judicial was, according to Lord Bryce, the distinguishing mark of a federation and (ii) in order that the spheres respectively of the centre and the units may be kept distinct it is absolutely necessary that the constitution of the federal structure will have to be reduced into writing.

Federations not fulfilling the tests

When these very important aspects of a federal structure are noticed, any structure that may possess the trappings of a federal structure, where the autonomy that is assured to the units therein is precarious or at the pleasure of the Centre, will not in any sense be entitled to the status of a federal structure, *contractual, administrative* or otherwise. Such a structure can only be *quasi*-federal or "legislative or incorporative" as the Scots called it in 1707.

The Canadian Constitution

The word Union is there in the preamble to the Canadian Constitution and Canada is really a Union of the Provinces. In the word Union, in the Canadian

Constitution there is a very clear emphasis on the unity of that country as a whole. In Canada, the Lieutenant Governors of the Provinces are appointed by the Centre. The Provincial Judges are also appointed by the Centre. The Centre also is given the power of veto of provincial legislation. Above all residuary legislative powers belong to the Centre. It is as a result of a study of these features of the Canadian Constitution that Wheare called it a *quasi*-federation. The view of Wheare is supported by eminent judicial authority also. Lord Haldane L.C. in *Attorney-General for the Commonwealth* v. *The Colonial Sugar Refining Company* (1914) A.C. 237 points out the close similarity between the Constitutions of the United States and Australia and proceeds to discuss the framework of the Canadian and the Australian Constitutions illustrating the differences between them and holding that while Australia and the United States were federal in a *strict* sense, Canada was federal in a *loose* sense.

Quasi-Federation

The question therefore arises, what is this federation in a *loose* sense? Wheare gives the answer after an examination of the aforementioned features of the Canadian Constitution. He puts Canada in a *quasi*-federal category. It is because that India presents certain other features in addition to the features presented by Canada that are destructive of the federal principles that Wheare puts India also in the *quasi*-federal category. The Indian Union possessing features in addition to those possessed by the Canadian Union detracting from its character as a federal structure lays emphasis also on *Unity* in specific terms. These features of the Indian Constitution reduce the federal character of it to vanishing point (Articles 257 and 365 may be noticed in this context).

The Australian Commonwealth

The Australian Commonwealth is avowedly an indissoluble federal structure. Lord Wright in *James*

v. *Commonwealth* (1936) 55 C.L.R. 1, quoting with approval Lord Haldane L.C. in *Attorney-General for the Commonwealth* v. *The Colonial Sugar Refining Company* (1914) A.C. 237, says:

"In fashioning the constitution of the Commonwealth of Australia, the principle established by the United States was adopted in preference to that chosen by Canada."

Just as the thirteen original colonies that were independent of each other went into a federal structure called the United States in the Philadelphia Convention, the five independent States referred to in the preamble to the Australian Constitution went into a federal structure called the Commonwealth of Australia. Except that the President of the United States is the head of a non-parliamentary executive, and that the Governor-General of the Australian Commonwealth is the head of a parliamentary executive, in other respects the Constitutions of Australia and the United States closely resemble each other and embody in themselves all the leading principles of federalism.

The Indian Structure

Leaving aside the Preamble and Part III Fundamental Rights, there are not many things in common between the Constitution of India on the one side and the Constitution of the United States on the other. On the other hand, the Constitutions of India and Canada share alike many common features that really cut across the essential principles of federalism. It was for this reason that Wheare classified India and Canada as *quasi*-federations.

Canada after witnessing the terrible consequences of the civil war in the United States which more or less threatened the very existence of the United States Constitutional System went about the business of framing its Constitution. The Canadian Constitution, therefore, naturally laid considerable emphasis on the Unity of the Nation as a whole though adopting the

principles of division of governmental powers between the Union and the Provinces. So doing, effective control was left with the Centre in all matters of importance so that the unity of the country may not be in peril in future.

The member States of the Australian Commonwealth fearing that their position would be imperilled if the Canadian model was adopted for Australia, opted for the United States model.

When the turn came to India to fashion her constitutional structure, the framers of the Indian Constitution had before them the advantage of the experience of the working of these three leading constitutional systems of the United States, Canada and Australia, besides the other systems of South Africa, Eire, France and the continental countries, from every one of which some idea or other has been borrowed by India. Apart from the precedents thus available, the one dominating idea of the framers of the Indian Constitution was how best to secure the unity of the country as a whole at least after the creation of Pakistan. It was as a result of a study of all these precedents and the demands of the local conditions that the framers of the Indian Constitution decided upon the present structure which is now in operation.

Indian Constitution Making

The process of Indian Constitution making is a complete reversal of the process of constitution making whether in the United States or in Australia. Hitherto independent States did not meet in the Constituent Assembly at Delhi. The British Indian Provinces under the authority of the Central Indian Government were the dependencies of the Crown of England. The Native Indian States were formerly subject to the paramountcy of the British Crown enjoying an appreciable measure of internal autonomy. The British Indian Provinces were represented by members elected indirectly by the Provincial Legislative Assemblies elected on a limited

franchise under the Government of India Act, 1935. The Native Indian States or groups of them were represented by nominees of the Rulers on recognized understandings. The representatives assembled in the Delhi constituent convention were not, therefore, representatives of the people as a whole in the sense that the representatives in the Philadelphia Convention were the representatives of the thirteen original colonies and their people. I mention these facts just to show that the background for a federal structure of any type was totally absent in the Delhi Constituent Assembly. Nor was it the object of the Members to evolve a federal structure either of the American type or of the Australian type. They were there not only to evolve a structure that would take in all the assimilable good in the Constitutions of the countries aforementioned but also to give India a constitution that would meet the requirements of the country specially from the point of view of its unity which had been seriously imperilled by the fissiparous tendencies of the Muslim League, which gave birth to Pakistan within the natural limits of India cutting one *People* into two. If this background is appreciated, it will be utterly futile to try to put India into some category or other of the constitutional systems known or can be imagined. The most that can be done is, to compare it with those systems that are somewhat similar to it.

Objection to Rigid Classification

I object to the classification of the Indian structure into any rigid category. Such classification is bound to detract from its essential purpose. If the objective of the Indian Constitution is to receive emphasis, the most that can be done by the exponents of the nature of its structure is to point out how it is like other leading structures or how it is not like them and why it is not like them. Any attempt at conventional classification will have by-passed the basic principles of the Indian Constitutional System. All that a constitutional structure is

meant to furnish, is a working principle of a government suited to the needs of a country and it is not necessary that it should conform to any set form or class or category. Even assuming that classification is necessary, the Indian Structure can go, if at all, into the *quasi*-federal category. That way the view of Prof. Wheare deserves attention and consideration.

The Thesis of Prof. Alexandrowicz

There is an interesting article in the *International and Comparative Law Quarterly* [1] by Prof. C. H. Alexandrowicz entitled *Is India A Federation?* In this article the learned professor would have it that "the Indian federation is *sui generis* in character". Adverting to the emergence of "dynamic linguistic communities" and "other forces that are continuously at work" in India, he points out that their growing power in relation to the Indian Union will in due time give them the status of "*bargaining* communities" and concludes:

"Though they have been unable to create initially a contractual formation, they may to some extent give India the appearance of a contractual federation *ex post*."

The learned Professor's prognosis may be sound or unsound but the question remains whether the tendency predicated can ever become possible in the light of the actual provisions of the Constitution which have not been examined in the thesis with the care they deserve.

Alexandrowicz and Wheare

The objective of the discussion of Prof. Alexandrowicz, as I understand it, appears to be to classify the Constitution of India. In so doing he has advanced several arguments to put it in the class of a federation of the administrative variety. If the Indian Constitution is not that, he would say it belongs to a class in itself. Even if it is not going to be a class in itself, according

[1] Volume III (1954), page 393.

to him, it would be sooner or later, as a result of the forces that are now operating, assume to itself. the appearance of a contractual federation *ex post.* One thing is very clear from this article and that is that the classification of India as a *quasi*-federation is unsound. Lengthy arguments have been advanced to substantiate this view against Wheare's classification. I may at once submit that the view of Prof. Wheare is entitled to greater weight than the view of Prof. Alexandrowicz, from the point of view of what has been already stated before and from the point of view of what will be stated hereafter.

This is how Alexandrowicz objects to the classification by Wheare:

"Rigid definitions of law and the impossibility of fitting reality into these definitions caused lawyers to multiply so called *quasi*-institutions."

Then it is stated

"Some constitutional lawyers and political scientists have adopted a rigid definition of the federal principle, and as many federations do not correspond in theory or practice to this definition, the institution of *quasi*-federation, which is said to be midway between a real Federation and a Unitary State, was introduced into the picture."

Quasi-*Federal Classification not Unsound*

I fail to see what is really wrong in introducing into the picture the institution of a *quasi*-federation. After all *quasi* institutions have come to stay in every branch of law. Where a particular institution does not fit into a legal definition but partakes of some of the features of the definition, it is the practice to put it into the category of a *quasi* institution of that variety. *Quasi* means *not exactly.* The word *quasi* has the added advantage of pointing out in clear terms that the institution in question falls short of the requirements of the legal definition. Stating that "Sovereign or Political power in a federation should be co-ordinated and divided between

Centre and the member States in such a way that each of them remains within its sphere independent of each other", the learned Professor proceeds to apply this principle to the existing political systems including India. He is right when he points out that the principle applies to the United States and Switzerland both in theory and practice. He shows that in the case of Canada the principle formulated will not apply in theory but would apply in practice, on account of the non-abuse of the powers vested in the Central Government of Canada. It may be pointed out that the powers vested in the Central Government of any modern constitutional system are not meant to be abused but meant to be used in the manner contemplated by the relevant provisions. If by a proper use of the powers belonging to the Government lodged in it with a definite objective in view, certain results flow, the agencies affected cannot naturally complain. Equally if the powers that are lodged in the Central Government are not going to be used even for the achievement of the objective of the vesting of such powers, the Central Government will be exposed to the charge of abdicating its powers. I submit that in the case of Canada, it is more because the provinces have conformed to the code of conduct prescribed for them by the terms of the Constitution that there is a federal structure working in practice than on account of the non-abuse of powers vested in the Central Government.

Theory v. *Practice*

Alexandrowicz is aware of federal structures in theory which do not so work in practice and points out the reason as the unbalance of powers to the disadvantage of the States on account of the growth of the Central powers especially in the financial field. He points out rightly that in spite of the federal form the Latin American Republics of Brazil, Argentina and Mexico behave in a highly centralised way in practice. This is inevitable under modern conditions when the pressure

on the Centre is increasing more and more by several forces at work which make a constant demand for money. A State with its limited resources cannot find the huge sums of money to finance the programmes that require implementation in any modern set up. Moneys for this purpose can be found only by a central government which is placed in a position of advantage wherefrom it can command all the resources available in the country as a whole. An examination of the provisions of Part XII of the Indian Constitution will show that the framers were very much alive to this tendency of modern times.

Alexandrowicz on Indian Structure

Dealing with Indian Federalism, Alexandrowicz says that the case of the Indian federation is certainly *sui juris*. Designating the Indian structure as a class in itself is not at all meeting the difficulty presented in classifying it,—even to the extent to which the difficulty has been met by those who put into the *quasi*-federal class.

Alexandrowicz is right, if I may so submit, when he says that federations are the result of contractual arrangements between federating units that were previously sovereign states and such federations are either multi-national or inter-community formations. He is right in drawing attention to the fact that in spite of national heterogeneity a federal compact was found possible in Switzerland and Canada. A federal compact resulted in the United States and Australia from national homogeneity. The learned writer then goes to discuss the nature of the U.S.S.R. structure and I submit with respect that I fail to understand how really that structure can conform to any type of classification, when it is seen that it functions more on account of the place of primacy accorded to the communist party than on account of the mechanics provided by the constitution itself. The Constitution of the U.S.S.R. is subordinate

to the mono-political party of that country. It is thus the U.S.S.R. is an autocratic State from which no one can derive any assistance in the study of the principles underlying the constitutions of a democratic State. Classifying the U.S.S.R. along with some of the uninational South American Republics, Alexandrowicz describes them as administrative federations as contrasted with contractual federations, that the United States, Canada, Australia and Switzerland are. What is this administrative federation? How does an administrative federation solve the problem of classification as such? If the argument that multiplication of *quasi* institutions resulted from the impossibility of fitting reality into rigid definitions of law is true, the same argument will apply with greater force to the invention of a classification into administrative federations. Assuming that classification into administrative federations is sound, the exigencies of the administration in modern conditions cannot in the very nature of things be fixed so that *administration* cannot furnish a basis for classification.

Alexandrowicz points out that the possibility of entering into a contractual arrangement did not happen with reference to India because of " the monopolistic or nearly monopolistic position " the Congress party occupied and this picture of the Indian Constituent Assembly, I submit, is not accurate in the light of the facts already given. The monopolistic or nearly monopolistic position of the Congress Party emerged only after the first General Election under the Constitution. Even though the Congress party was dominant in the Constituent Assembly, the entire work of framing the Indian Constitution was left to a Drafting Committee consisting mostly of specialists in the field who did not really belong to the party. It has been seen that the draft supplied by this Committee was practically accepted by the Constituent Assembly as a whole. Comparing the U.S.S.R. and India, Alexandrowicz points out that a contractual arrangement failed owing to a mono-party reality, and

therefore tendencies of centralization prevailed over those of decentralization. I submit this conclusion is far from correct. Centralization was decided upon by all alike in the Constituent Assembly. There was no other way of achieving the unity of the country as a whole. The framers of the Constitution could ill-afford to trifle with fissiparous tendencies and expose the country to another major risk. The unprecedented conditions through which the country passed witnessing the birth of Pakistan, the child of communal fanaticism, were mainly responsible for focussing the attention of the framers on the task of supplying a machinery which will keep intact the unity of the country at least thereafter. This dominant idea permeates the entirety of the Constitution. There are crucial provisions of the Constitution laying the greatest possible emphasis on unity both in times, abnormal and normal, so that at no point of time the unity of the country may be in jeopardy. The framers had to be keenly alive to this very important aspect of the Constitution because even though the people of the country belonged to a national group, that they were divided by barriers of languages spoken, religious practices and castes and creeds, had to be taken note of, so that appropriate provisions could be put not only with a view to break these barriers but also with a view to ensure the unity of the nation as a whole despite these barriers and other fissiparous tendencies that may develop on the basis of these barriers.

The Relevant Constitutional Provisions

Article 249 of the Constitution confers powers on the Parliament of the Indian Union to make law with respect to a matter in the State List in the national interests provided an appropriate resolution is passed by the Council of States. No doubt a situation contemplated by this Article may only be exceptional and it cannot be seriously urged that under existing conditions, this is a provision which is violative of any federal principle, if there is one, under the Constitution.

Under Article 252 in regard to any matter with respect to which Parliament has no power to make laws for the States, except as provided by Article 250 during the currency of a Proclamation of Emergency and under Article 249 already referred to, two or more States may by consent confer power on Parliament to legislate for them and other States that may thereafter adopt such legislation. This may also be not considered an abnormal provision cutting across the principle of federalism.

Any law of Parliament under Article 253 giving effect to International Agreements can cut across the distribution of legislative powers between the Union and the States and this cannot but be so because external affairs fall within the exclusive purview of the Indian Union Parliament for the benefit of the country as a whole.

The rule of repugnancy embodied in Article 254 also may not be considered as doing any violence to any principle of federalism because that is inevitable in the scheme adopted by the Indian Constitution in the matter of distribution of legislative powers.

It may even be that the several elements present in the Canadian Constitution that are present in the Indian Constitution and the position of advantage the Centre has especially under Chapter II of Part XI and in the financial field under Part XII, may be agreed to as inevitabilities that are permissible under modern conditions, but the provisions that are to be noticed hereafter do not leave any principle of federalism *stricto sensu* in the Indian structure.

The general control given under Article 371 to the Centre over the Part B States of the Indian Union for a period of ten years from the commencement of the Constitution has ceased to be of any importance after the passing of the States Reorganization Act, 1956, that came into force on the 1st November 1956. The only State that is peculiarly placed is the State of Jammu

and Kashmir and that is so for special reasons which are not germane to this discussion.

Taking the provisions of Part XVIII of the Indian Constitution covered by Articles 352 to 360 dealing with the three types of emergencies that may arise (i) by war or external aggression or internal disturbance (Article 352), (ii) by a situation in which the Government of a State cannot be carried on in accordance with the provisions of this Constitution (Article 356) and (iii) by a situation whereby the financial stability or credit of India or of any part of it is threatened (Article 360), the powers belong only to the President and to no one else to deal with any of these emergencies that may arise and in such an emergency situation even the semblance of federalism disappears and the country becomes at once a Unitary State if the emergency affects the entirety of the country. In a state of emergency the States can function only as mere agencies of the Centre. But so far as these very important provisions are concerned it is possible to agree with Alexandrowicz that these Central encroachments, according to the Constitution, will have to come to an end with the termination of the emergency when the federal shape will at once come into existence again.

The Omission of Alexandrowicz

But there is one Article which Alexandrowicz has omitted to consider in his article in question. This omission perhaps accounts for the many conclusions that he has drawn with which I cannot agree. I refer to Article 365 of the Constitution in Part XI which runs thus:

"Where any State has failed to comply with, or, to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of the Constitution, it shall be *lawful* for the President *to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution.*"

This is not a provision of emergency. But even in a state of normalcy disobedience of a State to a Central Executive direction of the kind contemplated by Article 365 will usher into existence a state of emergency akin to break-down of the constitutional machinery in the delinquent State. This is a provision which will have to be complied with in routine day to day administration having nothing to do with emergency of any type contemplated by Part XVIII. If a State in India fails to comply with or give effect to any executive direction of the Centre in the exercise of the executive power of the Centre, the failure on the part of the State will amount to a break-down of the constitutional machinery in that State which will entitle the President to step in the manner of Article 356 of the Constitution and set right matters therein. I would respectfully agree with the view of Alan Gledhill in his *Republic of India* (Commonwealth Series published by Stevens, London) that the States of India hold their status at the pleasure of the Centre. In the absence of Article 365, the reference to the Unity of the Nation in the Preamble and the statement in Article 1 (1) that India is a Union of States might have been taken as the expression of a mere sentiment but these references are meant seriously emphasising the unity of the country as a whole is amply borne out by Article 365, if not by the other relevant Articles. If a situation arises in which a State refuses to obey a Central Executive direction contemplated by Article 365, no question of use or abuse of powers by the Centre at all arises. The Centre will have to take action under Article 365 if the organic law of the country is not to be reduced to ridicule and contempt. If, however, the Centre for reasons best known to itself is not going to take action under Article 365, it will be a case of abdication of powers by the Centre which will result in a mockery of the Constitution. Like all Constitutions the Indian Constitution may also be subject to development through usage and convention. But Article 365 and other like Articles meant to meet particular situations

in particular ways cannot be changed by usage and convention. Usage and convention can supplement only those Articles that can be so supplemented.

It is relevant to notice that under Article 256, the State Governments are obliged to so exercise their powers as to ensure compliance with the laws of Parliament and existing laws that apply to them and the executive power of the Union extends to the giving of necessary directions in this behalf to the States.

States Reorganization

It is no doubt true that the various pressure groups functioning on behalf of the various linguistic communities have succeeded in getting the States Reorganization Act, 1956, enacted by the Union Parliament setting in motion the mere parliamentary procedures contemplated by Articles 3 and 4 of the Constitution. But in spite of the States Reorganization Act, all the essential provisions of the Constitution remain untouched. The reorganized States will have to function under the provisions of the Constitution of which Article 365 is one. Many States in India have now been reorganized on linguistic basis. Even so, India, that is Bharat, is a Union of States and the relevant Articles of the Constitution assuring the unity of the nation as a whole remain intact. It will be wholly pointless to draw general conclusions from the working of the Constitution during a limited period of nearly seven years. Seven years is nothing in the constitutional history of a country. It may be that no friction is generated in spite of the reorganization of States. It may also be that the Constitution may pass through a period of stress and strain as a result of linguistic fanaticism that may manifest itself here and there. In a state of trial, the Constitution, containing as it does enough effective provisions to deal with even a dangerous situation, may emerge as a successful instrument of Government, if those provisions are set in motion in the manner contemplated.

Conclusion

After the commencement of the Constitution there is no loyalty worth the name that remains except the loyalty to the Constitution and it has become imperative that the significance of this loyalty that will have to be sworn to by legislators of all levels, ministers of all levels, Heads of States of all levels, Judges of all levels and lawyers will have to animate every one of them in all that he may do both in public and in private, so that he may remain a standing example and an object lesson to the people at large, most of whom are still steeped in ignorance. There is no other way of ensuring the Unity of the Nation as a whole against the unleashing of linguistic fanaticisms of any kind or variety. It is, therefore, necessary that in the new circumstances that have come into existence by States Reorganization on more or less linguistic basis, the constitutional processes both at the Centre and the States should become clearly aware of their rights and duties *inter se* enshrined in the relevant Articles of the Constitution so that there may not occur another threat to the *Unity* of the country.

SOME REFLECTIONS ON ANCIENT AND MODERN JURISPRUDENCE.

Dr. HAMID ALI.

"The old order changeth, yielding place to new,
And God fulfils Himself in many ways,
Lest one good custom should corrupt the world."

It is sometimes remarked that we in India should strive to build up our systems of jurisprudence on our own individual lines and not merely be content to follow the leadings of the Western jurists, considering that the East is so different from the West in many ways, modes, and habits of thought and life. It seems to us that there is much in this remark. Let us therefore examine briefly some of the main principles of the Hindu and the Muslim jurisprudence and consider them with reference to the Western systems so that we may be able to appreciate better this point of view.

It is well-known that, unlike modern jurisprudence, in the Hindu and the Muslim systems, the starting point is not the State but God. The fundamental principle of legislation in ancient India and in Arabia is that all laws are traceable to God, and the decrees of the Almighty are revealed in the Vedas and the Koran. Under these systems of law, therefore, religion and law are so inextricably blended together that one cannot say where religion ends and law begins and *vice versa*, just as in pontifical jurisprudence in ancient Rome. In the words of Ganganath Jha,[1] "The Law of Hindus—like everything else conducive to the welfare of Man—has its source in the revealed word of the Veda. The Hindu will not admit of any other source for his *Dharma*. Jaimini, long before the fifth century B.C., formulated in his *Sutra* the three propositions that (1) What is good for man can be learnt from the Veda, (2) it can be learnt

[1] *See* "Hindu Law in its Sources".

from the Veda only, and (3) whatever the Veda says must be true. This supreme authority of the Veda is based upon its own eternal and immutable character (according to Purva-Mimamsa and Vedanta) and upon the fact of its being the work of the omniscient God."

In Muslim jurisprudence also we find the principle to be the same. To quote David De Santillana (Professor of the History of the Political and Religious institutions of Islam in the University of Rome), "The rule of Allah over his people is immediate and direct . . ." When the chief of a tribe that had adopted Islam said to the Prophet, 'Thou art our prince', the Prophet answered quickly: 'The prince is God, not I.'

Islam is the direct government of Allah, the rule of God, whose eyes are upon his people. The principle of unity and order which in other societies is called *civitas, polis, State*, in Islam is personified by Allah: Allah is the name of the supreme power, acting in the common interest. Thus the public treasury is the 'treasury of Allah,' the army is the 'army of Allah,' even the public functionaries are 'the employees of Allah' . . .

Thus "every legal question is in itself a case of conscience, and jurisprudence points to theology as its ultimate base."

Now let us turn to modern jurisprudence and let us for the present confine ourselves to the Austinian theory of jurisprudence. "Law", according to Austin, "is a command set either directly or indirectly by a Sovereign individual or body of individuals to a member or members of the independent political community in which his authority is Supreme." Again, "the force of law" Austin says "is derived from that ultimate sovereign authority which in every political community actually exercises *an unlimited power of command*[2] and is habitually obeyed by the bulk of the community." It is

[2] The italics are mine.

evident that there is no place for God in the Austinian conception of law and sovereignty—a view exactly opposed to the Hindu and the Muslim. Here it is well to note that the Western civilization is based on the Greek and Roman tradition, according to which "law is the legal norm approved by the people, directly or through the organs that represent them, and derives its authority from the reason and will of man, and his moral nature." In other words the roots of modern jurisprudence do not spring from God nor are they connected with religion, unlike the Hindu and the Muslim systems. It must, however, be said that Christianity, which most of the Western nations are professing to follow, "rejects the absolute sovereignty of the State and the individual: it only recognizes that of the Almighty. Christianity recognizes certain laws, not made by man, which affect the family within the State and the community."

One of the inevitable results of regarding law as proceeding from the unlimited sovereignty vested in the State—a sovereignty which "can do everything, but make a woman a man, and a man a woman", . . . is the evolution of the various *isms* . . . Nazism, Communism—and the totalitarian states whose very existence is postulated in the negation of Divinity.

Now the question is which of these two principles are we to accept—the Ancient or the Modern? The criticism often levelled against adopting the oriental point of view is that mixing up religion and law retards progress and it is a great handicap in keeping up with the advancing needs of the times. It is further pointed out that the economic, social, and political degeneration in the East may be attributed to their religious beliefs and that those nations who have escaped the "trammels of religion" are much better off, having taken great strides on the path of material progress and prosperity and that, therefore, the Hindu and the Muslim ways of life stand self-condemned.

This view is so widely held that it may be considered at some length. First of all, historically speaking, it is not correct to allege that the Hindus and the Muslims, and the oriental nations generally, have degenerated because of their faith in God. The truth is just the reverse. It is just because they gave up their ideals in their pristine purity that they began to decline. They have been the torch-bearers of civilization for centuries as long as they were devoted to their ideology and *Dharma*. Many an European scholar, who has drunk deep at the fountain of Indian culture, has paid glowing tributes to its profundity and sublimity. To quote Dr. Max Muller, " If I were to look over the whole world to find out the country most richly endowed with all the wealth, power, and beauty that nature can bestow—in some parts a very paradise on earth—I should point to India. If I were asked under what sky the human mind has most fully developed some of its choicest gifts, has most deeply pondered on the greatest problems of life, and has found solutions of some of them which well deserve the attention even of those who have studied Plato and Kant—I should point to India. And if I were to ask myself from what literature we, here in Europe, we who have been nurtured almost exclusively on the thoughts of Greeks and Romans, and of one Semitic race, the Jewish, may draw that corrective which is most wanted in order to make our inner life more perfect, more comprehensive, more universal, in fact more truly human, a life, not for this life only, but a transfigured and eternal life—again I should point to India."

No less is the appreciation of some of the greatest of Western scholars regarding Islamic culture and civilization. In the words of Thomas Carlyle (in his excellent essay on the " Hero as Prophet "), " These Arabs, the Man Mahomet, and that one century,— is it not as if a spark had fallen, one spark, on a world of what seemed black unnoticeable sand; but is, the sand proves explosive powder, blazes heaven-high from Delhi to

Grenada!" Again, to quote Duncan Greenless, "The importance of Islam today may be gauged from the fact that there are 209 million professing Muslims, about 10 per cent of the world's total population, of whom over 90 millions live in India and Pakistan. The Qoran is said to be the most-read book in the world. Its rhythms make it very musical to the ear and easy to remember. For more than thirteen centuries it has been the mainstay, solace, law, and moral criterion of countless millions. Wisely understood, it is adaptable for men at every level of culture, of every race, in every age. It is indeed a universal scripture, and eternal word from that deeper Fount of Wisdom that most men have always loved to speak about as God."

In reality what is said against the Oriental Institutions cannot stand the test of truth, for to admit that all the drawbacks in the Hindu and the Muslim society are due to their religion and their faith in God is to make Him responsible for all the evil in the world. This certainly cannot be true, for He is generally admitted to be eternal good. It is not God who is at fault. It is the concepts we have of Him that have to be set right. It is not religion that is to be blamed. It is our ignorance of what constitutes true religion which is to be dispelled, for "pure relation and undefiled before God and the Father is this, to visit the fatherless and widows in their affliction, *and* to keep himself unspotted from the world."

Further, the Hindu and the Muslim jurists did not draw any sharp distinction between law, morality, and religion for the simple reason that they looked at "life" as a whole and not as so many separate "water-tight" compartments. They laid down general principles of conduct which should govern man from "the womb to the tomb," taking into account all the minutæ of a man's daily life, so that a pundit or a moulvie is virtually a person, not only capable of solving legal problems, but he is also "a friend, philosopher, and guide" to those who come into contact with him.

Again, the principles of jurisprudence developed by these jurists have been formulated by saints and prophets from an hoary antiquity. They are based on a real and not a "pretended philosophy." They have been evolved from the innumerable variety of their religious experiences, in fact, from the very depths of their being. Their reason, intuition, and revelation have led them to the apodictical principle, "that God is; [3] that He is omnipresent, omnipotent and omniscient; and that "the Lord He is God (good); there is none else beside Him." In the words of A. Greassy Morrison (former President of the New York Academy of Sciences), "The conception of God rises from a divine faculty of man, unshared with the rest of our world—the faculty we call imagination. By its power, man and man alone can find the evidence of things unseen. The vista that power opens up is unbounded; indeed as man's perfected imagination becomes a spiritual reality, he may discern in all the evidences of design and purpose the great truth that God is everywhere and in everything but nowhere so close as in our hearts.

It is scientifically as well as imaginatively true, as the Psalmist said: "The heavens declare the glory of God and the firmament showeth His handiwork."

In conclusion, let us not 'by-pass' God as Natural Science and Western jurisprudence does. Let us not get engulfed in the atheism of out-and-out materialism. Let us make God, "The centre and circumference of our being"—of our economics, politics, and jurisprudence.

[3] I remember having stated my thesis on this topic to a Professor of Jurisprudence in a well-known University in the United States of America. Being a quaker by faith, he was inclined to support it; but he put me a very relevant question, "what about those who don't believe in God?" To this query it can only be said, "To those who believe in God no explanation is necessary: to those who don't no explanation is possible." For it is impossible to prove the existence of God by human standards of proof. It is obvious that Truth and its attributes, like love, mercy, justice, are not susceptible of being demonstrated through 'test-tube' methods. That is to say, "the natural man receiveth not the things of the spirit of God: for they are foolishness unto him: neither can we know them, because they are spiritually discerned."

Let our " Social Engineering " be under the guidance of God, the great Architect. The more we plant ourselves in the Divine Being, the more stable, progressive, and harmonious would our institutions be, for " God is light, and in Him is no darkness at all." In the words of Dr. Einstein (whose great epoch-making discoveries brought Science back into its true relationship with religion), " We see in rapturous amazement the harmony of natural law, which reveals an intelligence, of such superiority that, compared with it, all the systematic thinking and acting of human beings is an utterly insignificant reflection. This feeling is the modern scientists' guiding principle of life and work."

INDIAN MARRIAGES UNDER PRIVATE INTERNATIONAL LAW.

S. MOHAN,

The modern conception of Private International Law is not one much suited to the present day world. The term, Private International Law, is commonly, but not correctly, believed to mean nothing else than the conflict of laws. The two terms Private International Law and Conflict of Laws do not seem to be synonymous. If by Private International Law, it is only the " De-conflictu-Legum " that is meant—whenever two systems of law come into conflict with each other then there must be a problem of Private International Law. But it is not so at the present day. There is said to be a problem of Private International Law only if the systems of law of two different countries come into conflict with each other. The conflict in other words should be *inter-national* but not *intra-national.* Therefore there must not only be a conflict of two systems of law but also the two systems of law prevailing in two different countries. This idea that two systems of law of the different nations opposing each other, was the result of an unconscious importation of a generally accepted rule in the Public International Law, namely, that under the Public Law only the States can be the subjects, but never the human individuals. This rule may well serve its purpose under the Public Law. But this hampered the growth of Private Law to a considerable extent. The insistence that the conflict should be international may be good if only a uniform code is prevalent in a particular country to govern the personal actions of men such as marriages, contracts, succession, etc. But if the nation, like India, were to consist of many patterns of personal law to govern such actions, the abovesaid insistence shuts out the problems of a similar nature coming within the ambit of Private

International Law. There should be a conflict of laws of course—but why should the conflict of laws be international and not intra-national? If by Private International Law, it is only the conflict of laws that is meant, where is the necessity for the two national laws conflicting with each other? So what is looked into actually under the present conception of Private International Law is, whether the two national laws oppose each other, and not two systems of law conflicting with each other. The obvious question to be asked is, why should the modern jurists insist upon the presence of defined territorial limits by calling national law? Then will it not be that what ultimately decides a problem of Private International Law is not the mere conflict of the two systems of law, but the presence of geographical boundaries between the two systems of law? How will such a conception fit in the equities necessitated by the existence of parallel systems of personal laws? Should not this insistence be done away with in order that the growth of Private International Law may not be hampered?

How does this subserve the purpose and growth of Private International Law? Then again the question is, in order to satisfy the conservative and dogmatic minds of the lawyer and the logician should right be dispensed with by calling such problems where two systems of law oppose each other, intra-nationally, as problems of inter-personal law and not Private International Law? In this connexion a statement by G. W. Barthelomew may be usefully referred to: "It is clear, however, that if such problems are considered as coming within the scope of Private International Law, then the conceptional apparatus of the later will require extension for at the moment it is not fully adapted to deal with international conflicts."

The difficulty of disposing of such problems as problems of inter-personal law may be illustrated this way.

In India, the marriages are governed by the religious personal laws of the respective parties—A Muslim by Muslim Law, a Hindu by Hindu Law, a Christian by Christian Law. That being so, when an Indian Hindu going and contracting a marriage with a Muslim either of Pakistan nationality or of Indian nationality, the nationality of the Muslim does not alter the character of the problem. This is because in either case *ultimately* the laws that come into conflict will only be Hindu Law and Muslim Law and not Indian Law and Pakistan Law. At this stage it may be asked, that this may be true as far as the capacity of the parties to a marriage is concerned but what of the formalities of such a marriage?

But that question may be answered by a detailed discussion.

At the outset it may be mentioned, the tendency of the Indian Courts hitherto has been to borrow freely from the English principles and so a comparative study may throw much light on the answer for the above question.

Capacity of the Parties

English Law.—It is generally stated, in English Law, the capacity is governed by the law of the domicile of each party to the marriage—the "Lex Domicil" of the parties. Dicey states: a marriage is valid when each of the parties has, according to the law of his or her respective domicile, has capacity to marry each other. Halsbury also supports this statement of Dicey. But Professor Cheshire criticises that the law of 'pre-marriage domicile' should not be applied to test the capacity for the wife loses on marriage her domicile and acquires the domicile of the husband. Therefore he is of the opinion that in order that injustice may not be done, the law of 'matrimonial domicile' should be applied to find out the capacity. Savigny is also in agreement with this view. Likewise Huber.[1]

[1] In De. Conflictu Legum.

The law on this point was concluded by Sottomayor's case No. 2.[2] A Domiciled English man married in England his first cousin a domiciled Portuguese. The law of Portugal prohibited a marriage between first cousins.

Though Sir James Hannan held the marriage valid, he did not base the decision on the fact that England was to be their matrimonial residence. But it can be said with emphasis, that though such a marriage was prohibited in the country of the woman's domicile, considering the validity of marriage from the law of matrimonial residence alone it constituted a valid marriage.

The Indian Law on this Aspect

The capacity is governed by the law of domicile of each of the parties to a marriage. The leading case on this point is: *Chetti* v. *Chetti.*[3]

The facts of the case briefly are: Mr. Venugopala Chetti domiciled in Madras—British Indian subject—married in London Registrar's office an English lady. On 15th October a child was born to them. Later he returned to India and wrote to her to come back to India and to be with him. After that there was no communication between the two. The lady filed a suit for the dissolution of marriage and for maintenance of the child. Mr. Chetti pleaded that under the Hindu Law, he is incapacitated to marry any one but a Hindu and that he carried the incapacity with him to England and therefore the marriage with the lady was not a valid one.

Sir Gorell Barnes held as follows: The capacity to marry is to be determined by the law of the domicile of the parties. The law of real property stands on an entirely different footing. He also relied on Westlake who states "It is indispensable to the validity of marriage that the personal law of each of the parties be satisfied, so far as regards the capacity to contract it

[2] *Sottomayor* v. *De-Barros* (1879 L.R. 5, P.D. 94).
[3] 1909 Probate, page 67.

whether absolute in respect of age or relative in respect of the prohibited degrees of consanguinity or affinity. Sir Barnes went on further to state that the disability was not a part of the law of domicile on the ground that it was not a general disability imposed on all inhabitants of India. For this proposition also he relied on Westlake[4] . . . " an incapacity existing by a foreign law of a penal or religious nature so far as opposed to British principles as for example slavery will be disregarded in England."

Thus the validity of the marriage was upheld and a decree for dissolution was granted.

It is interesting to note a few statements given as answers to questions by Bashyam Iyengar. Though Sir Gorell Barnes dismissed them as opinion evidence, they seem to be of much importance as far as Indian Law is concerned. One of the questions put to him was: " Would a ceremony of marriage gone through in England or anywhere outside between a Hindu male of the aforesaid caste (Brahmana, Vaisya, Kshatriya and Sudra) and a Christian woman be held to be a valid marriage by the Courts in British India? "

The answer was " If a question should arise in British Indian Court as a question of foreign law of place where the ceremony purporting to be a ceremony of marriage was gone through (a question which would have to be proved in Indian Court as a question of fact) the Indian Court would hold the intended marriage either as valid or invalid according to the foreign law as proved but the Court will not recognize such a union as constituting a valid marriage for its enforcing any marital rights as between the Hindu male and the Christian woman who have gone through the ceremony of marriage in a foreign country though according to the law of such foreign country the union would constitute a valid marriage."

[4] S. 16 of Westlake Treatise.

Therefore it is clear that such a marriage would not have been upheld if it had taken place in India. But the statutes have modified the "*status quo*" to a great extent. The Special Marriages Act of 1872 was passed enabling a Hindu to marry a Christian, Buddhist, Jain, etc., but he ought to declare that he does not profess Hinduism. But even this was modified by the Special Marriages Act of 1923 whereby it was made that even without declaring himself he could undergo the ceremony of marriage provided he is willing to suffer some consequences as severance from joint Hindu family and his succession to be governed by the Indian Succession Act enabling his father to adopt a son where he happens to be the only son of a family. If a Hindu happens to marry under this Act his capacity will be governed by the provisions of this Act. Section 2 of the Act prescribes the capacity. The latest, Special Marriages Act of 1954 has replaced the above Act.

Formalities.—English law looks to "Lex loci celebrationis" as laid down in the leading case of *Nachimson* v. *Nachimson* [5] and *Simonin* v. *Mallac.* [6] The rule to be observed as far as the lack of consent by the parent or guardian of either is, whether the particular statute absolutely prohibits such a marriage in the absence of consent or whether it requires consent merely as a formality.

The Indian Law on the formalities can also be deduced as the *Lex loci celebrationis.*[7]

A Muslim domiciled in India married an English lady in the London Registry Office. After marriage they came to Bombay and his wife embraced Islam. The husband later on pronounced "talak" in order to divorce her. The question arose whether this "talak" operated as a valid divorce and whether the marriage could be recognized as valid. It was held that "the pronouncement of 'talak' operated as a valid divorce as both of the parties

[5] (1930), P. page 217.
[6] (1860) 29 L.J. (N.S.), P. page 97.
[7] (1909) P. page 78: *Chetti* v. *Chetti.*

at the date of divorce were Muslims. As far as the validity of marriage was concerned since the formalities were governed by ' lex loci celebrationis ' and because the marriage was valid according to English Law, it was upheld."[7a]

But as to the question of what the position would be, if the wife remained a Christian, in the Appellate Court Bloomfield, J., stated, if it were necessary to decide the matter he would certainly not be prepared to hold that she could, in that case, be divorced by " talak." Beamount, C.J., however, was of the opinion that the marriage could have been so dissolved even if the wife had *not* been converted to Islam.

In current legal Problems[8] though Vasey Fitzgerald states that it is " surmised with some confidence that future Indian decisions are more likely to follow Beamount, C.J., than Bloomfield, J., it is submitted with great respect that the opinion of Beamount, C.J., is not correct and it can be reconciled—if reconciliation is possible—only on the ground that the wife acquires on marriage the domicile of her husband.

In a recent case[9] the Calcutta High Court held: " There is no reason why in the case of a Hindu marriage the principle as one would regard as *prima facie* applicable, viz., a marriage will be governed by the law under which it was celebrated should not apply."

But in the above cases, the marriages took place outside India. If the marriage were to take place in India, say a Hindu domiciled in India, marries a Muslim lady domiciled in England and if the marriage were to take place in India, which is the lex loci celebrationis? To consider a slightly intricate problem of a similar type, if the Muslim were to be domiciled in India, which is the lex loci celebrationis? The above such marriages are

[7a] (1935) I.L.R. 59 Bom., page 278: *Khambatta* v. *Khambatta.*
[8] (1948), page 241.
[9] *Eakiya Bibi* v. *Anil Kumar Mukerjee* I.L.R. (1948) II Cal., page 130.

possible only under the Special Marriages Act, 1954, in India, and hence if the formalities are complied with as required under that Act, that will be sufficient. In such cases lex loxi celebrationis is one Indian Act and not the religious personal laws.

Change of Law:—Lastly it has to be considered as to what will be the position of the parties if there is a change of law. The change of law would either take place by the change of domicile or by embracement of another religion.

The English Law defines a marriage as a voluntary union for life of one man and one woman to the exclusion of all the others [9a] and thus it ordains monogamy as a rule of law. Of course this rule will hold good as regards the persons who are subject to English Law.

The same rule is extended even to a case of change of domicile for, e.g., when an Indian Muslim acquires the English domicile, he would be subject to the rule of monogamy. This is also supported by the following two decisions, viz.:—

Sinha Peerage claims case;[10] and
Srinivasan v. *Srinivasan*.[11]

But it is important to note that the recently passed Hindu Marriages Act, 1956 [12] strictly ordains a rule of monogamy for all Hindus and others like Buddhists, Jains, etc., governed by the Act.

Conclusion

To sum up—(i) The present conceptional apparatus of Private International Law should be expanded, so as include all problems which are now described as problems of " inter-personal law."

(ii) The capacity of the parties may be governed by the lex domicile even in problems of inter-personal law, the laws of domicile being the religious personal laws.

[9a] *Hyde* v. *Hyde* (1866) L.R.I.P. & D. 130.
[10] (1939) L.J.P. 171 (1946 I All. E.R.).
[11] (1948) 2 All. E.R. 21.
[12] Act XXV of 1955 (Central).

(iii) The formalities of the marriage in problems of ' inter-personal law ' are to be governed by the lex loci celebrationis, which is the aforesaid Indian Act and can never be the religious personal law.

(iv) The rule of monogamy or polygamy may be extended even to cases where there is a change of law caused by one of the parties embracing another religion or acquiring a new domicile.

PANCH SHILA AND PRINCIPLES OF BASIC RIGHTS AND DUTIES OF STATES.

A. PALANISWAMI.

The one question that is agitating the mind of every one today is whether the forces of peace will triumph or the entire world will go under a third cataclysm, the possibilities of which cannot even be imagined.

It is the duty of every State to guarantee peace to posterity and it is the duty of every responsible individual to explore all possible means by which tranquility may be assured. Therefore, a few pages may, profitably, be devoted to a consideration of the question whether the five principles which go under the name *Panch Shila* can be accepted as the basic principles or pattern upon which the rights and duties of States may be woven so that those principles may go to guarantee enduring peace. In fact several attempts were made by individual writers, international bodies and conferences to formulate the basic rights and duties of States. But there was no unanimity as to the number or contents of these rights and duties. Probably their large numbers and the sharp differences of opinion as to the contents of these rights and duties, contributed to the failure of a standard formulation. This state of affairs led to a searching criticism of the whole matter. Most of the authorities have urged that the notion of fundamental rights of States should totally disappear from international law. But, however, there was and is a general opinion that a State as an international person has got certain inherent rights and duties.

An important step was taken in 1947 when the International Law Commission completed its formulation of a Draft Declaration of Rights and Duties of States. This draft declaration still remains a draft under study

by governments, and has failed to command general adoption.[1] In the circumstances it is not out of place to examine the merits of the principles of " Panch Shila."

History of the Evolution of the Five Principles

The term " co-existence " which is the last of the five principles can be traced to Lenin. In his statement before the Communist party Congress in 1919, he envisaged the doctrine of co-existence as a necessary evil. The essence of the principles can be found in other documents like the Charter of the United Nations Organization. The Pantja-Sila—(1) Divine Omnipotence, (2) Humanity, (3) National Consciousness, (4) Democracy and (5) Social Justice—embodied in the preamble to the Indonesian Constitution, was perhaps the source of inspiration for the now famous ' Panch Shila ' in international relations. But, a speech by Prime Minister Nehru on the occasion of the visit of Dr. Ali Sastromidjojo, the Prime Minister of Indonesia, in September 1954, seems to prove the contrary.

Prime Minister Nehru has said:

" This afternoon . . . you referred to certain basic principles which govern Indonesia. You call them Pantja Sila, which is from our Sanskrit word " Pancha Shila." We talk also of another Panch Shila or principles which have recently come to the fore. You may call them Panch Shila also in the same way. . . ."[2] The compilation of these principles under the name of Panch Shila is a new innovation in the international sphere. ' Panch Shila ' or ' Pancha Shila ', a Sanskrit word, literally means ' five rules of conduct.'

These five principles were for the first time employed in an agreement entered into between the Republic of India and the People's Republic of China on

[1] For a critical remark of the Draft Declaration, *see* Prof. Kelsen in A.J.I.L. (1950), pages 259 to 276.

[2] P.I.B., 23rd September 1954, page 8.

29th April 1954 on trade and cultural intercourse and facilities of pilgrimage and travel between India and Tibet. But they came to limelight only in June 1954.

The Prime Minister of the People's Republic of China, Mr. Chou En Lai visited India in the last week of June 1954 and on 28th June 1954 a joint statement was issued by the Prime Ministers of India and China from Delhi re-affirming their faith in the five principles and expressing their hope that these principles should be applied in their mutual relations, and in their relations with other countries in Asia and other parts of the world.

The five principles are:—

(1) Mutual respect for each other's territorial integrity and sovereignty.

(2) Non-aggression.

(3) Non-interference in each other's internal affairs.

(4) Equality and mutual benefits.

(5) Peaceful co-existence.

These five principles have been accepted by many States [3] as guiding principles for their mutual relations and they believe that their observance will contribute to the maintenance of international peace and security. In the Bandung Conference,[4] twenty-nine Asian and African nations have adopted these five principles with certain extensions and modifications. India has also concluded agreements with certain Middle East countries incorporating these five principles. As such these principles have received the recognition of a number of States as the principles for the promotion of international peace and security or in other words as the principles for the avoidance of war.

[3] India and China—28th June 1954.
India and Indonesia—23rd September 1954.
India and Jugoslavia—23rd December 1954.
China and Burma—July 1954.
India and the U.S.S.R.—23rd June 1955.

[4] April 1955.

The nature and content of each one of the five principles may now be examined.

Mutual Respect for each other's Territorial Integrity and Sovereignty.

States are required to respect the territorial integrity and sovereignty of the other States. Respect for the territorial integrity means recognition and acceptance of the extent of the State. This restriction comprises not only the duty to refrain from the threat or use of force against the territorial integrity of another State, but also the duty to refrain from performing acts of jurisdiction in the territory of another State. The later duty may be called in other words, as the duty not to perform acts of sovereignty. This is wider than the duty imposed under Article 9 of the Draft Declaration of the Rights and Duties of States. The words "Every State has the duty . . . to refrain from the threat or use of force against the territorial integrity . . . of another State" in Article 9 does not prohibit an act of jurisdiction without any threat or use of force.

Respect for sovereignty means the duty to acknowledge and accept the rights of every other State attributable to sovereignty. Sovereignty means the supreme authority which acknowledges no restriction. But modern international law speaks of the sovereignty of States and at the same time of the duties of States also. Probably it may be correct to say that sovereignty of States today means the residuum of powers which they possess within the confines laid down by international law.[5] Independence and territorial and personal supremacy are aspects of sovereignty.[6] Jurisdiction, that is, territorial and personal in the widest sense of the term is the power to create and apply the law. This extends the respect for legislative and executive acts of the States.

[5] Starke: An Introduction to International Law, page 86.
[6] Note Article 1 of the Draft Declaration of Rights and Duties of States.

Non-aggression

There is no satisfactory definition of the term "Aggression."[7] An act of aggression may be taken as an act of force prohibited by law, here prohibited by international law. The principle of non-aggression prohibits acts in violation of the principles of international law. This principle comprises a duty to respect the obligations imposed by the general principles of international law. It may also be understood as meaning a prohibition of unlawful threat or use of force. There it imposes a duty, not to resort to use of force, or threat of use of force against another international person. Anyway it recommends peaceful solutions for disputes among international persons. So every State is under a duty to settle its disputes with other States by peaceful means in such a manner that international peace, security, and justice, are not endangered.[8] There can be no aggression without a dispute as to a particular right. Even if there is none the aggressor will always allege a breach of a duty by the other party imposed by the principles of international law. The corresponding benefits to the other States by this duty of non-aggression will be—independence, territorial and personal supremacy—the aspects of sovereignty. The same is found incorporated under Article 9 of the Draft Declaration on the Rights and Duties of States. Article 9 runs as follows:—

"Every State has the duty to refrain from resorting to war as an instrument of national policy and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order."

Acquisitions against this rule of "non-aggression" will be invalid.

[7] *See* the Draft Code of offences against the peace and security of mankind submitted to the 1950 session of the General Assembly and the definition of aggression by Debiprosad Pal in I.Y.B.I.A. (1950), Volume III, pages 341 to 356.

[8] Article 8 of the Draft Declaration of Rights and Duties of States.

Non-interference in each other's Internal Affairs

This principle prohibits intervention. Intervention here means dictatorial interference. This is an accepted principle in general international law. The same is found incorporated in Article 3 of the Draft Declaration on the Rights and Duties of States. It runs as follows:—

"Every State has the duty to refrain from intervention in the internal or external affairs of any other State."

Article 3 contemplates prohibition of intervention in the external affairs also, whereas the third principle, of the five principles, seems to exclude that. It may be argued that prohibition against intervention in the external affairs is provided in the second principle, namely, "non-aggression." But, however, it will sound better if the third principle is recast as:

"Non-interference in each other's internal or external affairs" or

"Non-interference in each other's affairs."

Intervention by the United Nations Organization is prohibited under Article 2 (7) of the Charter. Article 2 (7) prohibits intervention of the international body only in matters which are essentially within the domestic jurisdiction of any State. This cannot be interpreted to mean that the organization could intervene in matters relating to its external affairs.

Recognized excuses for intervention, for example, self-preservation, may be considered to be exceptions to this principle. Self-defence may also be accepted as not offending this principle or as an excuse for intervention.

Equality and Mutual Benefit

The fourth principle expounds the rule of "Equality before the law". This does not refer to equal rights in all the laws but to the (equal) application of

the law by the law-administering agencies. This right of the States is referred to in Article 5 of the Draft Declaration. Article 5 says:

"Every State has the right to equality in law with every other State."

This article speaks of "right to equality". Prof. Hans Kelsen criticises the use of the term "right to equality". He says "It is not correct to speak of a 'right to equality'. The principle of equality of States, i.e., the principle that all States are equal, cannot be formulated as the right to equality. Law is regulation of human behaviour. Hence a right necessarily refers to behaviour, to the behaviour of the person. What is meant by the right to equality is the right of a person to be treated by other persons, especially by the law-applying organs of the community in a certain way. It is generally admitted that the principle of 'equality before the law' which Article 5 formulates. . . ."[9]

International law generally recognizes this equality of States. This doctrine of equality of States was introduced into the field of international law by the naturalist writers and still holds the field.

The equality of States has four important consequences. Firstly, every State has got a right to vote for the decision of a question to be settled by the consent of the States. Normally every State has only one vote—*vide* voting in the General Assembly of the United Nations.

Secondly, legally there is no difference between the vote of the largest and most powerful State and the vote of the smallest and the least powerful State. This legal principle has been honoured in its non-observance in voting procedure in the Security Council.

Thirdly, no State can claim jurisdiction over another. This rule is expressed in Latin as "*par in parem non habet imperium*".

[9] A. J.I.L. pages 268 and 269.

Fourthly, equality requires recognition of the official acts of other States. This may be considered to be an aspect of sovereignty as I have said under the principle of " mutual respect for each other's territorial integrity and sovereignty ". These are recognized principles in general international law.[10]

There is express recognition of the doctrine of equality in the Charter of the United Nations Organization. It speaks of " respect for the principle of equal rights "[11] and says that the Organization " is based on the principle of the sovereign equality of all its members ".[12]

" Mutual benefit " requires the States to be good neighbours. States are bound to refrain from fomenting civil strife in the territory of another State and to prevent activities within its territory calculated to foment civil strife in the territory of another State. This is the duty imposed under Article 4 of the Draft Declaration.[13] In an aggressive war it should not assist the aggressor but should help the other, namely, the wronged State or the United Nations Organization, as the case may be. This is the essence of Article 10 of the Draft Declaration.[14] States must also ensure that conditions prevailing in its territory do not menace international peace and security.[15]

Peaceful Co-existence

Peaceful co-existence[16] requires States to live in peace under the given circumstances. It does not mean

[10] See Oppenheim, 7th edition, Volume I, page 238.

[11] Article 1 of the Charter of the United Nations Organization.

[12] Article 2 of the Charter of the United Nations Organization.

[13] Article 4: Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife.

[14] Article 10: Every State has the duty to refrain from giving assistance to any State which is acting in violation of Article 9, or against which the United Nations is taking preventive or enforcement action.

[15] Article 7: Every State has the duty to ensure that conditions prevailing in its territory do not menace international peace and order.

[16] For a complete account, see C. J. Chacko on Co-existence, in the Indian Year Book of International Affairs, Volume IV, 1955, pages 13 to 41.

that *status quo* should be maintained, in other words States are to live with the international problems as they are. It means that States must " live and let live " others.

It has been clearly stated by Prime Minister Nehru that peaceful co-existence means co-existence with those who do not agree with you. There is no meaning in talking of co-existence with friends, because that is inevitable and needs no active step.[17]

The fifth principle is nothing but the essence of the above four principles. The observance of the first four principles will result in the evolution of the fifth, peaceful co-existence.

Co-existence requires mutual respect for each other's territorial integrity and sovereignty.[18] There can be no co-existence if there is aggression.[18] It will not permit intervention either internal or external,[20] but implies the recognition of " sovereign equality ". On the economic side, co-existence demands equality and mutual benefit.[21] This principle has already found a place in the Preamble of the United Nations Charter " We the Peoples of the United Nations determined . . . to practise tolerance and live together in peace with one another as good neighbours ".

This principle of co-existence was originally sponsored by the Russians. It did not get universal approval of the other members of the Family of Nations because the sponsors understood it as a temporary balance between the opposing forces of capitalism and communism. India has imbibed the spirit of it and has declared that it is " the only alternative to co-destruction ".[22] It means " live and let live ". For the western bloc it means

[17] P.I.B., November 19, 1954, page 13.
[18] Principle No. 1 of Panch Shila.
[19] Principle No. 2 of Panch Shila.
[20] Principle No. 3 of Panch Shila.
[21] Principle No. 4 of Panch Shila.
[22] Department of State Bulletin (U.S.A.), Volume No. 789, page 194, August 9, 1954.

living together as good neighbours without any intention to destroy each other. Disputes should be settled by peaceful means, and not allowed to remain permanently.

If the Communist bloc gives up the idea of ultimate fall of Capitalist bloc and success of Communism and accepts " co-existence " as meaning " live and let live ", these principles may have really a chance of evolving ultimately as general principles of international law.

Drawbacks

Certain duties may be formulated so as to create certain rights for the individuals, viz., " non-discrimination of individuals " imposing a duty upon all States, not to discriminate individuals on the basis only of race, sex, language and religion, or extension of human rights or fundamental freedoms contained in Article 6 of the Draft Declaration.

However such a right has no effective remedy. So there is no use of formulating a right even in the nature of a duty without an effective legal remedy.[22a]

It must, however, be remembered that this document is purely a political document. If, however, it should be backed in due time by the goodwill of the nations, it may partake of the character of a legal document. But this lies in the lap of future.

Conclusion

State independence and State liberty resulting from State Sovereignty are the two leading fundamental rights of the States in International Society. But corresponding to these Fundamental Rights the States are constantly reminded about their Fundamental Duties as well, such as the duty to have a governmental structure which will carry out international obligations

[22a] It is possible to suggest that such a formulation will however help the people to become conscious of their rights and strive for their effective protection.

assumed by them and the duty to co-operate with other States in the interest of general security of the nations of the world. The United Nations Charter primarily aims at harmonizing these rights and duties. The Draft Declaration of Rights and Duties of States again is aiming in a higher degree to achieving this end. The " Panch Shila " has, however, the merit of laying precise emphasis in the securing of the harmonization of the Rights and Duties of States.

In these circumstances, it may be submitted that the principles of " Panch Shila " are better suited for adoption as the principles of basic rights and duties of States than the principles put forward by the International Law Commission in the Draft Declaration for Rights and Duties of States for the following reasons:—

In the first place " Panch Shila " has received the acceptance of more States.

Secondly, as Prof. Hans Kelsen has aptly put it " the principles of international law which the Declaration of Rights and Duties of States intends to formulate could—and should—be formulated only in terms of duties. If for some reason or another, especially in order to conform with the usual terminology, not only the duties but also the corresponding rights are to be formulated, the duties should precede the rights. For the duty is the primary, the right a secondary, legal concept ". [23] The principles of " Panch Shila " primarily formulate duties. The observance of these duties confer corresponding rights upon the other States. But under the Draft Declaration the principles are not formulated in the nature of duties. [24]

Rights are enjoyed in their non-infringement and generally not in their active exercise except the right of self-defence.

[23] A.J.I.L. (1950), page 265.

[24] Note Articles 1, 2 and 5 of the Draft Declaration of Rights and Duties of States.

Thirdly, acceptance of "Panch Shila" will be a proper recognition of the part played by Asian and African States in the international field in the recent years.

Prof. Oppenheim says that "International Law as a law between sovereign and equal States based on the common consent of those States is *a product of modern Christian civilisation.* . . ."[25] (Italics mine). Further, this law considered the non-Christian States for a long time as not sovereign and not equal to the Christian States, and permitted its subjects (Christian States) to invade the other (non-Christian) States merely for the purpose of acquiring colonies. This historical accident in the growth of modern international law may produce an indirect dislike towards it on the part of those non-Christian States that tasted the rigours of colonialism and gained independence with bitter experience.[26]

"Panch Shila" as the general principles of international law will make the Asian and African States foster real respect for international law.[27]

In the circumstances, India may try to get the acceptance of these principles from the other States as well, which will in due course convert them into general principles of International Law.

[25] Oppenheim, 8th edition, Volume I, page 72.

[26] Note Prime Minister Jawaharlal Nehru in his address to the United Nations General Assembly at Paris on November 3, 1948:

"May I say, as a representative from Asia . . . that the world is something bigger than Europe, and you will not solve your problems by thinking that the problems of the world are mainly European problems. There are vast tracts of the world which may not in the past, for a few generations, have taken much part in the world affairs. But they are awake; their people are moving and they have no intention of *being ignored or being passed by* (Italics mine) . . . Today I do venture to submit that Asia counts in world affairs. Tomorrow it will count much more than today."

[27] Note a speech by Prime Minister Nehru reported in the *Hindu* on 24th September 1953:

" . . . it is going to be less and less feasible in the future for any world organization to leave Asia out of account or to consider it only as a playground for their politics or conflicts. *Inevitably, Asia is bound to resent this kind of treatment.* . . ." (Italics mine).

SOVEREIGNTY OVER KASHMIR.

V. SURESHAM.

The recent discussions in the Security Council regarding Kashmir represented more a political manœuvre by Pakistan to divert the attention of the people of Pakistan from the Government's failure internally and internationally. But a singular lack of perspective and non-adherence to factual details on the part of British and certain other western delegates, has divorced the proceedings from the strictly legal implications.

The circumstances that led the Indian Union to file a complaint in the United Nations Organization are too well-known to need recapitulation here. But it is just as well to remember that it was a complaint against aggression by Pakistani raiders into the territory of Kashmir.[1] Hence the standpoint of the Indian Delegation hinges upon this act of aggression by Pakistan and the restoration of *status quo*. All other questions like the stationing of an International Force, or a division of Kashmir or even a plebiscite, are superfluous in view of the established sovereignty of the Indian Union over the territory of Jammu, Kashmir and Ladakh, including the so-called "Azad-Kashmir" area occupied by Pakistan. This sovereignty stems from various reasons.

Under British rule the relationship between the Indian States and the Crown was conveniently summed up in one word—Paramountcy. Though at one time there was a serious controversy about the exact connotation of this apparently elusive term, it is possible to explain it with reasonable accuracy. In the Government of India Act, 1935, the term "Paramount Power" definitely meant the Crown acting through the Secretary

[1] United Nations Bulletin, 15th January 1948.

of State for India and the Governor-General-in-Council (or the Crown Representative as the case may be) who were responsible to Parliament in Great Britain. The cessation of British rule on 15th August 1947, put an end to the series of treaties, sanads and prescriptive rights of the Crown *vis-a-vis* the Indian States. In other words, British Paramountcy terminated on that date. But this does not imply that the Indian Union is bereft of this attribute of power in the new set up. On the other hand it would be fallacious to assume that Paramountcy reverted in full to the respective princely States because these States had never enjoyed external sovereignty. The policy of the British Government towards the Indian States passed from an original plan of non-intervention in all matters beyond its own ring fence, to the policy of subordinate isolation initiated by Lord Hastings, and ultimately these States have been, in the present century, compelled to enter a scheme of subordinate co-operation with the Paramount Power. Their lack of external sovereignty is apparent from the Butler Committee Report which says:

"It is not in accordance with historical fact that when the Indian States came into contact with the British Power, they were independent, each possessed of full sovereignty and of a status which the modern international lawyer would hold to be governed by rules of International Law. In fact, none of these States ever held international status. Nearly all of them were subordinate or tributary to the Moghul Empire, the Mahratta Supremacy, or the Sikh Kingdom, and dependent upon them. Some were rescued, others were created by the British."[1a]

A similar view was taken by the Cabinet Mission, when it said:—[2]

". . . That the rights of the States which flow from the relationship of the Crown will no longer

[1] Indian States Committee Report, page 23.

[2] Memorandum of the Cabinet Mission on States Treaties and Paramountcy presented to H.H. the Chancellor of the Chamber of Princes (paragraph 5),

exist and all other rights surrendered by the States will return to the States. Political arrangements between the States on the one side and the British Crown and British India on the other will thus be brought to an end. The void will have to be filled either by the States entering into a federal relationship with the successor Government or Governments in British India, or failing this, entering into particular arrangements with it or them"

Hence cessation of British Paramountcy did not mean, in a country enjoying unity of structure and functions, that there was to be no paramountcy at all. In a press conference, dated 4th June 1947, Lord Mountbatten definitely stated that Indian States could not have Dominion Status by themselves, nor could they enter into separate economic or military treaties with His Majesty's Government. In short, after 15th August 1947, the Indian States were merely left with the choice of acceding to either of the two new Dominions, namely, India or Pakistan.

The Government of Pakistan had accepted as part of the partition arrangement that Pakistan was and will continue to be only a seceding State and that the Indian Union continued to represent the international personality of undivided India.[2]

This standpoint has been part of International practice. That was the position, for, e.g., of the Irish Free State when it seceded from the United Kingdom.

Indian Sovereignty over Kashmir is also referable to the accession by the Ruler of the State. It is not for the Indian Government to question the competency of the Ruler to accede. Neither is it open to Pakistan to do

[2] It is on this basis that Pakistan had no legal claim to the sterling balances. In fact India paid Pakistan 55 crores of rupees of her own free will *after* Pakistan had invaded Kashmir. (This single fact alone should be sufficient to underline the bona fides of the Indian Government.)

so, having accepted his authority and entered into a Standstill Agreement with him. The routine forms for Accession and Standstill Agreements were evolved *before* partition of the subcontinent and hence the competency of any Ruler to accede to either Dominion was never questioned. When Pakistan entered into a Standstill Agreement with the Ruler of Kashmir they expected him, in the normal course, to accede to Pakistan. Thus it is too late in the day to decry the accession to India as a unilateral act and that it is a fraud on the people of Kashmir. Pakistan is estopped from questioning the Ruler's *right* of accession as well as the *choice* involved in the process of the exercise of that right.

It will be pertinent in this connexion, to refer to international practice in relation to merger of territory. When the Hawaiian Islands became part of the United States of America by merger, the Japanese Government protested that the people of the islands were not consulted. The reply of the United States Government was as follows:—

"In international comity and practice the will of a nation is ascertained through the established and recognized government, it is only through it the nation can speak. . . . The present Government of the Hawaiian Islands, recognized by Japan and other countries, has been in existence for a series of years, during which time public peace and social order has been maintained, and the country has enjoyed an era of unprecedented prosperity. The Government of the United States sees no reason to question its complete sovereignty, or its right to express the national will."

This view is in keeping with the merger of Texas with the United States of America, an occurrence which has a striking similarity to the developments in Kashmir. The territory of Mexico rifted away from the Spanish Empire. Later on Texas, a portion of Mexico, revolted against Mexico. In 1844, Texas was harassed by raiders

from adjoining Mexican territory and sought United States aid. After consultation between Texas and the United States, the United States Congress passed a joint resolution in March 1845 declaring the merger of Texas with United States of America. Mexico protested against this merger as a violation of her rights and the following reply from the President of the United States set the matter at rest for all time:—

"The Government of the United States did not consider this joint resolution as a violation of any of the rights of Mexico, or that it afforded any just cause or offence to his government; that the Republic of Texas was an independent power owing no allegiance to Mexico, and constituting no part of her territory or rightful sovereignty and jurisdiction."[4]

The British view was exactly the same and was expressed by Lord Cairns in *United States* v. *Wagner* [5] as follows:—

"In the Courts of Her Majesty, as in diplomatic intercourse with the Government of Her Majesty, it is the Sovereign, and not the State, or the subjects of the Sovereign, that is recognized."

International Jurists have consistently recognized the power of the head of a State to conclude international treaties. Thus Dionisio Anzilotti, former President of the Permanent Court of International Justice at the Hague, stresses the Principle of *Jus representationis omnimodae,* when he states that:

"International Law imputes to a State all the manifestations of will and all the acts which the head of the State, acting in that capacity accomplishes in the domain of international relations." [6]

[4] Moore, Digest of International Law, Volume I, page 277.
[5] (1867), 36, L.J.Ch. 624.
[6] Diritto Internazionale, Volume I, Chapter II, Section 2.

Another reputed international jurist, Larnaude puts it pithily when he states—

" . . . If a foreign government asks the government of another state to produce its title of legality, it meddles with internal political questions." [7]

There is a much more compelling analogy in Indian history itself. The procedure followed during the Round Table Conferences of 1930-32, is a clear indication that the Rulers of Indian States were accepted as plenipotentiaries and as sole constitutional spokesmen of their subjects. Again, during the talks held by the Cabinet Mission, provision was made for discussions with a Negotiating Committee of Princes. This consistent recognition of the Rulers of the Indian States was inevitable in the nature of things, because the entire transfer of power was made across the bridge of the Government of India Act, 1935. The Government of India were fully conscious of their sovereignty over Kashmir when the complaint against Pakistani aggression was carried to the United Nations Organization. In fact, the Prime Minister of India, in his letter, dated 20th August 1948, to the U.N.C.I.P. asked for definite assurances laying down the limits of the reference. The Chairman of the U.N.C.I.P. is reported to have given the following assurances in response to this letter:—

(1) Responsibility for the security of the State of Kashmir rests with India.

(2) The sovereignty of Jammu and Kashmir shall not be brought into question.

(3) There shall be no recognition of the so-called " Azad-Kashmir " Government.

(4) The territory occupied by Pakistan (" Azad-Kashmir ") shall not be consolidated.

(5) Exclusion of Pakistan from the affairs of Jammu and Kashmir.

[7] Revue generale de droit international, Volume 28, page 457.

This crucial move by the Chairman has not been referred to, but neatly side stepped by the leader of the Pakistan Delegation, Mr. F. K. Noon, in his speeches, and undoubtedly, this has been winked at by certain other powers. It was left to the Colombian Delegate to expose realities, and bring in a refreshing approach with due regard to the background of events. The standpoint of the Indian Government, that the withdrawal of Pakistani forces must be a *condition precedent* to any other step, only demonstrates current international trends. The Egyptian Government, for example, has been consistently demanding the withdrawal of Israeli forces from the Gaza strip and has succeeded in that move. (It is a sad commentary on the efficacy of international parleys, that Egypt could succeed on this point only by threatening to checkmate the issue by holding up clearance of the Suez Canal and not through any genuine Anglo-French co-operation).

Infringement of the sovereignty of India by Pakistan is a continuing act of aggression and there has been no attempt to deny it. The only excuse offered is that Pakistan could not control the raiders and was not responsible for their activities. This has no relevance to actual facts which irresistibly point to Pakistan's active participation in aiding and abetting the raiders. But, even if this excuse were true, Pakistan would still be liable as aggressor according to accepted canons of International Law. Thus, the former President of the Permanent Court of International Justice at the Hague, Dionisio Anzilotti, clearly states the principle of liability as follows:—

"The State which knows that an individual is plotting an unlawful act against a foreign State and does not prevent it when it should have done so (patienta); and the State which receives an offender and screens him (receptus) become in a certain manner accomplices in the commission of the offence; a kind of solidarity is created between them and the culprit, derived from the tacit approval of the act: from this approval, and **not**

from the relationship between the individual and the State, arises the responsibility of the State." [8]

Another former President of the same Court, Gustavo Guerrero, is equally emphatic when he says [9] that a State will be responsible for hostile acts which cannot be reconciled with the mutual rights and obligations of States, *inter se*. Yet another distinguished judge of that Court, Charles de Visschen of Belgium, has categorically stated that the responsibility of a sovereign State includes the duty not to directly infringe, or indirectly permit the infringement of the sovereignty of another State. He insists that this is a cardinal rule of international amity. [10] The same view is stated with compelling clarity by Bustamante Y. Sirven of the same Court when he opines—

"It is always necessary that the act or omissions should constitute an infraction of an international obligation which is exclusively charged on the defaulting State. Externally it is the State and not the individual which is responsible, and, in consequence, it is the State which must have failed to discharge its duty towards other juristic persons of international law. The primary act which has caused injury may be that of an individual; but the responsibility of the State arises only when it had the power to prevent the act and did not do so, or when it should have punished the act and was able to do so but voluntarily left it unpunished." [10a]

The British view is to the same effect. The eminent British writer on International Law, W. E. Hall remarks—

"Foreign nations have a right to take acts done upon the territory of a State as being *prima facie* in consonance with its will; for instance, where uncontrolled power of effective willing exists, it must be assumed

[8] Teoria generale della responsibilita dello Stato nel diritto internazionale.

[9] La Codification du Droit International, page 88.

[10] Biblioteca Visseriana, Volume II, page 93.

[10a] Derecho Internacional Publico: Chapter XVIII.

in the absence of proof to the contrary that all acts accomplished within the range of the operation of the will are either done or permitted by it." [11]

It has been held in *Sarropoulos* v. *Bulgaria* [12] by the Greek-Bulgarian Mixed Arbitral Tribunal that a Government is not exempted from liability where an unruly mob is directed against foreigners. [13] Again in the *George Hopkin's Case,* [13] similar liability was enforced in a decision by the General Claims Commission in a dispute between Mexico and the United States of America.

The abovenoted judicial pronouncements and opinions of writers of international reputation leave no doubt as to when and under what circumstances a State becomes an aggressor by infringing the sovereignty of another State.[14] These utterances have an intimate significance in view of the right that India has, under Article 36 of the Charter of the United Nations Organization, to demand a reference to the Permanent Court of International Justice, if the Security Council persists in side-tracking the original issue of aggression in Kashmir.

The Case Against Plebiscite

1. There is no procedure available to the Security Council or any other organ of the United Nations Organization to force a plebiscite on a sovereign State in respect of part of its territory. In the instant case, the basis upon which the reference was made by India to

[11] International Law, Section 11.

[12] M.A.T. (1928), page 47 at page 50.

[13] American Journal of International Law 21 (1927), page 160 at pages 164-165.

[14] The acts of pillage and ruthless killing by the Pakistani raiders are corroborated by unimpeachable sources. The faithful account given by Margaret Bourke-White ("Half-way to Freedom", pages 210-211) and the graphic description by Father Shanks (Letter from Father Shanks in *Daily Express*, London, dated 11th November 1947), an eye-witness to the merciless attack on the St. Joseph's Convent at Baramulla, are notable examples.

the United Nations Organization, specifically excluded the question of sovereignty.

2. India voluntarily offered to respect the wishes of the people of Kashmir *provided* the initial act of aggression was removed.

3. This offer lapsed on the refusal of Pakistan to withdraw from the so-called " Azad-Kashmir " territory. But the Government of India carried out their word of honour by holding elections in Kashmir in the best manner possible under the prevailing conditions.

4. The principle of a plebiscite has never been a satisfactory solution of international problems and the present trend is against such a method.[14a] Thus when the United States of America bought the Danish West Indies in 1916, the Government of Denmark suggested that the wishes of the inhabitants may be taken into consideration. The United States of America declined to do so.[15] Sovereignty was the sole factor. The unfavourable British reaction to a demand for a plebiscite in Cyprus is also significant in this respect.

5. There can be no right to demand a plebiscite by a *third party.* If that were so, it will lead to the illogical position that a similar demand could be made in respect of every Instrument of Accession signed in the entire sub-continent. A demand for a plebiscite comes with ill-grace from a country which never held a general election since its inception. This demand is made in respect of Kashmir where the Indian Union has held an election compatible with international requirements and is preparing to hold yet another election. It is the democratic personality of Pakistan that is in question.

6. Over a period of nine years, the context in which the offer of a plebiscite was made, has fundamentally

[14a] Mattern—" Employment of the plebiscite in determination of sovereignty " in 38, Johns Hopkin's Varsity studies in Historical and Political Science.

[15] Hackworth's Digest of International Law, Volume I, Section 62.

altered. It will be a retrograde step to equate the mediaeval set up in Azad-Kashmir with the progressive democratic set up in the rest of Kashmir based on a sound policy of economic prosperity. Sir Ivor Jennings, Constitutional Advisor to Pakistan in 1954-55, has stated as his considered opinion[16] that—

(*a*) "The question whether the Maharaja's accession in October 1947, was final and irrevocable is not, however, the fundamental question."

(*b*) "It would not allow Pakistan to argue that there never was an accession within the meaning of section 6 of the Government of India Act, 1935."

(*c*) "The *fundamental question* is whether the State of Jammu and Kashmir is lawfully included among the territories of the Union of India by section 1 and the First Schedule of the Constitution of India."

This *fundamental question* is answered by the learned jurist himself in the first two propositions. If Pakistan cannot question the accession, it is perfectly lawful for the Constituent Assembly of India to frame the Constitution it did. The legality of the inclusion by section 1 and in the First Schedule flows from the sovereignty resting with the Indian Union by virtue of the accession.

Conclusion

Indian Sovereignty over Kashmir is outside the scope of reference to the United Nations Organization. Moreover, the failure of the Security Council, for nine long years to remove the encroachment on that sovereignty, leaves it no jurisdiction whatever to hold a plebiscite, demand the withdrawal of Indian forces, or much less, to impose an International Force without the consent of the Government of India. In the face of Pakistan's persistent violation of the Cease-Fire Resolution, no formula can be evolved and the sole responsibility for the stalemate rests with Pakistan. Hence no new cause of action arose on 26th January 1957. An endorsement of

[16] Letter published in *The Times*, London, dated 5th March 1957.

the will of the people of Kashmir, expressed through their elected representatives, cannot be characterised as a flouting by India of International commitments. India has only stood firm on her sovereign rights, which is only the accepted mode of international behaviour. The question of Indian sovereignty over Kashmir cannot be better stated than by quoting the Leader of the Pakistan Delegation—[17]

" To reopen the discussion today on the three points of sovereignty, accession and plebiscite is only to cloud the issue, prolong the controversy and thereby continue the tension and strain between India and Pakistan."

Admittedly therefore, the issue on which a decision is possible is that of aggression by Pakistan. That is the *only* relevant issue before the Security Council of the United Nations Organization.

[17] Letter from Mr. F. K. Noon published in *The Times*, dated 5th March 1957.

JOINT LIABILITY UNDER SECTION 34, INDIAN PENAL CODE : SOME ASPECTS.

V. BALASUBRAMANYAM.

"The apparent simplicity of the language of this section has been found to be delusive. There are few other sections of the Indian Penal Code, in the interpretation of which there has been so deep a divergence of opinion in all the Courts in India as in the case of section 34 of the Indian Penal Code" (per Young and Rachhpal Singh, JJ., in 55 All. 607 at page 613).

The large number of decisions of the High Courts and the Supreme Court reported every year fully bear out the truth of the above observations. An attempt is made herein to indicate, with reference to recent decisions bearing on some of the aspects of section 34, the possible source of confusion.

Offences committed by groups of persons are of frequent occurrence. The liability of the individual members of the group in such cases is dealt with by a number of sections[1] of which section 34 is the most important one. Section 34 states "When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." As the section originally stood, the words 'In furtherance of the common intention of all' were not there. These words were added by section 1 of Act XXVII of 1870 in order to make the object of the section clear, and to define more precisely the conditions under which the joint or collective liability arises. The section does not create any specific offence but is merely declaratory of a principle, viz., the commonsense principle, that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually.

[1] e.g., sections 34-38, 149, 396 and 460, Indian Penal Code.

Thus, to attract the principle there should be (*a*) a criminal act which is joint and (*b*) an intention which is common and in furtherance of which the criminal act is committed.

The word criminal act is used in section 34 in the broadest possible sense. It would cover any word, gesture, deed or conduct of any kind on the part of a person, whether active or passive, which tends to support the common design. A criminal act in section 34 consists of the entire bundle of acts or omissions, tied together with the chain of common intention that have combined to constitute the offence. The acts that it might comprise within itself may be similar or diverse. In *Barendra Kumar Ghosh* v. *Emperor*,[1a] the Privy Council said 'A criminal act means that unity of criminal behaviour which results in some thing for which an individual would be punishable if it were all done by himself alone, that is, in a criminal offence.' Thus, criminal act includes the separate acts, similar or diverse, of the several participants and the effect produced thereby.

There is, however, considerable divergence of opinion as to the meaning of the expression 'in furtherance of the common intention of all.' In the first place what is the common intention referred to?

(i) One view is that common intention refers to the mere desire or willingness to commit the bare physical act on the part of the several participants.[2] It may be best described as '*volitional*' intention, that is to say, the bare resolution of the will, divorced from any contemplation of criminal consequences, just to do a physical act.

(ii) A second view is that common intention in section 34 means the *mens rea* or mental ingredient required by law to constitute the very offence which has

[1] [a] 52 Cal. 197.

[2] Per Lodge J. in *Ibra Akanda* v. *Emperor* 1944, 2 Cal. 405. *See* also *Adam Ali Talukdar* v. *Emperor* 31 C.W.N. 314 and *Nanda Mallick* v. *Emperor* 41 C.W.N. 575.

in fact been committed and must therefore embrace the results or consequences of the physical act of the accused and further that it means intention in the narrow sense as opposed to mere knowledge that certain consequences may follow, i.e., the desire to commit the very offence which is committed.[3]

(iii) A third view, which would appear to be a modified version of the first, is that common intention in section 34 means the intention to commit some crime but not necessarily the crime actually committed by the several participants. Wanchoo J., in *Saidu Khan* v. *The State* observes:[4] " It seems to me therefore that the common intention postulated in section 34 is a common intention to commit a *crime*, that is some thing punishable under the Indian Penal Code or any other law but not necessarily the offence which results from the joint act of the doers " and adds: " In my opinion the construction put by Lodge J., when he said 'It will be sufficient if all of them intended that the joint act be performed'[5] is, if I may say so with respect, the correct one with this addition that the joint act to be performed must be a crime that is some thing punishable under the Indian Penal Code or any other law. "[6] Further according to this view, the intention of the actual doer which is an ingredient of the crime actually committed is to be distinguished from the common intention though it must not be foreign to, or inconsistent with the common intention.[7]

(iv) The fourth view is that what is common intention depends upon the facts and circumstances of each case. Khundkar J. in *Ibra Akanda* v. *Emperor*[8] says " Common intention in section 34 cannot be given a

[3] Per Das J. in *Ibra Akanda* v. *Emperor* 1944 2 Cal. 405. *See* also *Anirudh Mana* v. *Emperor* 1925 A.I.R. Cal. 913; *Sundersingh* v. *Emperor* 14 Luck 660; *Nga E.* v. *Emperor* 8 Rang 603; *Emperor* v. *Mujjafar Shaikh*, 1940, 2 Cal. 253.

[4] I.L.R. (1952) All. 639 at page 701.

[5] I.L.R. (1952) All. 639 at page 703.

[6] *See* also *Nazir* v. *Emperor* 1947. All. L.J. 417 at page 427 and *Hulliah and another* v. *The State* 1954 Cr.L.J. 454 at page 455.

[7] *See Bashir* v. *The State* (1953) Crl.L.J. 1505 at page 1512, (1944) 2 Cal. 405.

constant connotation. Sometimes it may be identical with the *mens rea* necessary for the offence actually committed but this is not always so. It is also not necessarily identical with the immediate intention to do the physical act. In some cases the real common intention may be to do a criminal act the accomplishment of which might require some other criminal act to be committed. In such cases the common intention is really a wider purpose common to all which would embrace the *mens rea* which makes the ancillary act a crime, not as a primary intention but as a secondary or contingent intention, not in the forefront of the conscious mind but latent or dormant in it."

Intention as used in the Code denotes the desire to produce a certain consequence, and common intention should refer to a consequence in the contemplation of the several participants that is jointly desired by them. The first, third and the fourth views do not fully recognize this. Further the liability of the several parties to whom section 34 applies is co-extensive and they are all liable to be punished for the same offence. "The law makes no distinction between them or between the parts played by them in doing the criminal act. Each is guilty of the same offence. If section 34 applies it is impossible to convict the conspirators of different offences." [9] This is not conceded by those who hold the first or the fourth view. On the other hand the possibility of the different participants being guilty of different offences is clearly recognized by them. If the second view is adopted and intention means the *mens rea* for the crime actually committed and section 34 cannot apply to offences, in which the *mens rea* is not intention but knowledge (e.g., section 304, Part II) or to offences that involve no *mens rea* at all.

It is submitted that in actual practice the real conflict is only between the second and the third views.

[9] *Bashir* v. *The State*, 1953 Cr.L.J. 1505 at page 1511.

Should the crime actually committed be intended by all or is it sufficient that it is a step in furtherance of the crime intended? In *Bashir* v. *The State* [10] it is pointed out " The words in furtherance of the common intention are not enacted for nothing. They are not to be treated as non-existent or mere surplusage. If the common intention contemplated by the section were the intention to do the criminal act actually done then that by itself would mean that the criminal act done was done in furtherance of the common intention and the words in furtherance of the common intention would be without any content. These words were added by the Legislature in 1870 and must have been added for a purpose. That purpose could be none other than to make persons acting in concert liable for an act which is not exactly the act jointly intended by them but has been done in furtherance of their common intention. The words would not have been required at all if the common intention implied an intention to do the very criminal act done." In this case A, B, C and D formed a common intention to cause simple or grievous hurt and the hurt caused by them on the head of the deceased even after he had fallen down resulted in fracture of the skull and untimely death. It was held that all were guilty under section 302 as the liability of all the conspirators under this section is for the criminal act actually done and not for the common intention, i.e., the act jointly intended by them. However the act done must not be foreign to the common intention. It must be something contemplated or likely to result from that which has been intended.'[11] Common intention thus viewed approximates to common object or purpose in furtherance of which different acts each with a separate intention may be committed and the scope of the section would be widened to the same extent as under section 149 of the Penal Code. This would be obliterating an important distinction between section 34

[10] *Bashir* v. *The State*, 1953 Cr.L.J. 1505 at page 1511.

[11] Wanchoo J. *Saidukhan* v. *The State*, 1952 1 All. 639 (at page 700), *Nazir* v. *Emperor*, 1947 All. L.J. 417, *Bashir* v. *The State*, 1953 Cr.L.J. 1505.

and section 149 that is emphasized in a number of cases.[12]

Further, according to this view the crime actually committed is determined with reference to the actual intention in committing the particular act (e.g., the fatal blow) committed by one of the participants and then all are constructively liable for it. In Bashir's case [13] it is observed "All that remains to do is to find out the offence by the whole criminal act (done by all the conspirators); each conspirator is to be convicted of it. If the nature of the offence depends on a particular intention or knowledge, the intention or knowledge of the actual doer of the criminal act is to be taken into account. That intention or knowledge will decide the nature of the offence committed by *him* and the others will be convicted of the same offence because as pointed out above they cannot be convicted of a different offence. The intention of the actual doer must be distinguished from the common intention as already pointed out. It is an ingredient of the offence said to be constituted by the criminal act. It is a personal matter. . . ." Is it permissible to split up the transaction into its parts and take that part producing the evil consequence and find the *mens rea of the person doing that part* (be he known or unknown) determine the offence made out and then attribute it to all? This would be counter to the spirit of the interpretation of the term 'criminal act' in its widest sense. If several persons give a beating and death results due to a particular injury, the intention of the person causing that injury determines the character of the offence. Should others share this intention? According to the above view they need not. Supposing it is a case where the court wishes to apply section 304, Part II, should the knowledge of the person causing the injury be shared by the others? Can knowledge be shared? Unless others also possess that knowledge they cannot

[12] *See* Basappa 1951 Mys. 1; Faiyaz Khan 1949 All. 180.
[13] *See* also *Nazir* v. *Emperor*.

be held liable according to Wanchoo J. in *Saidu Khan* v. *The State.*[14] As for others sharing the intention of the person causing the fatal injury let us take the case of *Kripal and others* v. *The State of U.P.*[15] The three accused *A, B* and *K* were working the well that morning. When they saw *M* and *S* going past the well, they asked them where they were going. On being told that they were going to harvest *J*'s field they abused them and asked them not to go. *M* and *S* did not listen but proceeded. When they had gone 30—40 paces *A, B* and *K* rushed at them and began to beat them with the handles of the spears in the hands of *B* and *K* and the lathi in the hands of *A*. *J* arrived at the spot and asked the accused why they were beating his labourers and stopped them from beating. *A* hit him on the legs with the lathi and he fell down. *K* stabbed him with the spear near the ear. *B* then stabbed him with his spear on the left jaw, put his legs on his chest and extracted the spear blade from his jaw and just as the blade came off *J* died. It was held that (1) the accused had common intention to beat *M* and *S* and they are liable to be punished under section 323 for causing hurt (simple), (2) the three accused did not have the common intention to kill *J* and that *B* alone is guilty of murder, (3) the three accused had common intention to beat *J* also with the weapons in their hands which were likely to cause grievous injuries[16] and in this view they would all be guilty of an offence under section 326. The finding under (2) would be out of place if the view in Bashir's case were to be accepted. The participants other than the 'actual doer' need not share that person's intention. The difficulty that the Supreme Court expresses is not one of finding a common intention to commit a crime but of finding a 'common intention to kill'.

[14] (1952) I All. 639 at page 708.
[15] (1954) Cr.L.J. 1757 (S.C.).
[16] It appears from the judgment that the injury inflicted by *K* was a punctured wound without any penetration and appeared to be 'a fairly simple one'. The lathi blow said to have been given by *A* produced no visible injury. It is difficult to see how section 326 applies.

In *Kinaramdas and others* v. *The State.* [17] There was a sudden quarrel between *K* and the deceased and *K* ordered the other three accused *U, B, S* to come and beat the deceased. *S* dealt the first blow on the head of the deceased. Then, *K, B, U* dealt several blows to the deceased. Death resulted due to the injury on the head. There were *two* minor injuries on the body of the deceased. It was held that the four accused did not have the common intention to kill and *S* alone was liable for the fatal blow because section 34 did not apply. The other three accused were punished under section 323. It is difficult to see how without applying section 34, the others are liable under section 323 when there are two injuries and *it is not known who caused them.*

Again in *Anna* v. *Hyderabad State* [18] *A, B, C, D* and some others were prosecuted for attacking *X* in pursuance of a conspiracy. *A* and *B* hit *X* with axes but there was only one injury on the head and that proved fatal. *Y* who tried to intervene was hit by *C* and *D* with lathies and suffered two simple and one grievous hurts. Evidence as to conspiracy was not believed and in the absence of other adequate proof the participation by the others was disbelieved. With regard to *A, B, C* and *D,* however it was held that they had no common intention to kill and all were not liable for murder. But *A* and *B* were held guilty of murder and *C* and *D* of grievous hurt under section 326. These findings are unsupportable unless section 34 is applied to *A* and *B* as a unit [19] as well as *C* and *D* as another unit.

It is submitted that the common intention should be gathered from the whole conduct of all the persons and

[17] (1955) Cr.L.J. 57.

[18] (1956) Cr.L.J. 887.

[19] Referring to *A* and *B* it was observed "I am not awarding the extreme penalty of law, viz., death because it is not clear as to on account of whose blow death was caused". Srinivasachari J. at page 893, col. (1).

not from individual acts. In the above case the transaction is split up into two parts and separate intentions assigned in each case.

In the end the question of common intention is one of pure fact. " It should be understood clearly that what is required is the formation of a common intention; no particular kind of common intention is required. The common intention may be to do a certain act regardless of the end and the means, it may be to achieve a certain end regardless of the means, or it may be to do an act with certain means regardless of the end ".[20]

In the second place how is the common intention to be proved? The existence of a common intention is again a question of fact. Direct proof of the same would rarely be available, and in the vast majority of cases it has to be inferred from the particular facts and circumstances of each case. Apart from conspiracy, which needs proof of its own, the question of common intention must be found inferentially from the facts of each case, the acts of each accused such as the character of the attack, the nature of the injuries and from the nature of the weapons used—the whole conduct of all the persons concerned.

As to what presumption can be drawn from the facts no general rule can properly be laid down. The presumption as to common intention is subject to the same restrictions as other presumptions and it must not take the form of a bare surmise or conjecture.

Common intention of several persons means that each of them has the same intention and each shares that intention with others. The intention of each should be known to the rest and shared by them. Same or similar intention is not common intention. To make it common there must be proof of words or acts between the persons or other circumstances from which the inference of sharing may properly be drawn.

[20] *Bashir* v. *The State* (1953) Cr.L.J. 1505 at page 1508.

Intention may be the result of premeditation but it may also spring into existence all of a sudden or on the spur of the moment. As for common intention if there is evidence of a pre-arranged plan or a pre-meditated concert amongst the accused proof of common intention is rendered easy. On the other hand the suddenness of the incident in which several have participated renders the inference of common intention difficult. Proof of a preconceived plan has an evidentiary value of a high degree but is not a necessary link in the chain of proof relating to a common intention.

In *Mahbubshah* v. *Emperor,*[21] *A* and *H* collected reeds from land belonging to *G*. A quarrel took place between *A* and *G* and *A* struck *G* who shouted for help. Hearing his shouts *W* and *M* came up from behind bushes with guns. When *A* and *H* tried to run away they were intercepted by *M* and *W*. *W* fired at *A* and killed him. *M* fired at *H* and wounded him. The High Court held that *G, M* and *W* did not have a common intention to attack *A* and *H* and that with reference to *M* and *W* a common intention came into being when they simultaneously fired at *A* and *H*. Their Lordships of the Privy Council disagreed, and held that a common intention to kill could not be inferred in the absence of a pre-arranged plan or pre-meditated concert to murder *A* in rescuing *G*. The Privy Council observed " Section 34 lays down a principle of joint liability in the doing of a criminal act. *The section does not say 'the common intention of all'*[22] nor does it say 'an intention common to all'. Under the section the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the

[21] (1945) Lah. 367 (P.C.).

[22] The section plainly speaks of 'the common intention of all'!

common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle it is clear to their lordships that common intention within the meaning of the section *implies a pre-arranged plan and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan.* As has been often observed it is difficult if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case." (Italics mine.) Referring to the finding of the High Court that a common intention came into being subsequently though it was not there in the beginning their lordships proceed to say " Their lordships find none. *The evidence falls for short of showing that the appellant* (M) *and* W *ever entered into a premeditated concert to bring about the murder of* A *in carrying out their intention of rescuing* G. [23] Care must be taken not to confuse same or similar intention with common intention; the partition which divides their bounds is often very thin; nevertheless the distinction is real and substantial and if overlooked will result in miscarriage of justice. In their lordships view the inference of common intention within the meaning of the term in section 34 should never be reached unless it is a *necessary* inference [24] deducible from the circumstances of the case." (Italics mine.)

The above observations rightly stress the caution to be observed in distinguishing common intention from same or similar intention. The fact that common intention is a matter of inference from the facts of each case is equally well-emphasized. However the insistence upon proof of a pre-arranged plan or premeditated

[23] According to their lordships, the further circumstance that *M* and *W* tried to prevent *A* and *H* from running away before they fired, does not advance the prosecution case.

[24] This is merely stating the ordinary rule of circumstantial evidence [*see Pandurang* v. *State* (1955) Cr.L.J. 572 S.C.]

concert as a *sine qua non* of the existence of a common intention is over-emphasizing the evidentiary aspect. Premeditation or a pre-arranged plan provides excellent proof of the intention being common. But is proof of such a plan indispensable in inferring common intention? A number of decisions have parrot-like repeated the passage from Mahbubshah's case relating to the pre-arranged plan and negatived common intention on the ground of the absence of a pre-conceived plan or design more or less in the shape of a conspiracy. Indeed in *Ramnath Madho Prasad* v. *State* [25], it was held that if the evidence adduced on the charge of conspiracy was inadequate the same cannot be used for finding common intention under section 34, I.P.C.

A premeditated act denotes something which is not done on the spur of the moment. One would normally suppose that in the case of a criminal act committed by several persons on the spur of the moment, i.e., regarding which there was no prior design it is not a case of a premeditated act. Actually in some cases the view has been expressed [26] that section 34 cannot apply to cases of offences that are committed in the course of a sudden quarrel, where the intention develops all of a sudden, e.g., the cases governed by exceptions 1 to 4 of section 300. But even in sudden occurrences if the entire conduct of all the participants taken together clearly suggests concerted action and the sharing of the same intention by all—as an inference of fact—then section 34 should apply. This is eminently a practical question. Since Mahbubshah's case, however, the insistence upon proof of a pre-arranged plan as a necessary step in the inference of common intention has embarrassed the judges in this category of cases and they have been obliged to add to a simple conclusion of fact, explanations of an artificial nature.

[25] 1953 Cr.L.J. 1772. See also *Ganesh Prasad* v. *Narendranath Sen*, 1953 A.I.R. 431 S.C. and *Anna and others* v. *The State* 1956 Cr.L.J. 887.

[26] Per Das J. in *Ibra Akanda* v. *Emperor* 1944, 2 Cal. 405.

In Nachimuthu Goundan's case,[27] where in pursuance of a direction given by one of the accused all the accused attacked the deceased and caused his death—though there was no pre-conceived plan—the Madras High Court while applying section 34 referred to *Mahbubshah's* case and observed " The decisions of the Privy Council is warrant only for the proposition that it is not enough to attract the provisions of section 34, Indian Penal Code, that there was the same intention on the part of the several people to commit the particular criminal act, or a similar intention, but it is necessary that before the section could come into play that there must be a pre-arranged plan in pursuance of which the criminal act was done. *Their Lordships do not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with,* nor do they say that the intention cannot be inferred from the conduct of the assailants ". (Italics mine.) It is submitted that their Lordships wanted a pre-arranged plan to be inferred before drawing the inference as to common intention.

It has likewise been held in several cases subsequently that a common intention can develop in the course of events and the suddenness of the occurrence does not prevent its formation " There must be a pre-arranged plan, but that plan may be made shortly or immediately before the commission of the crime. A longstanding conspiracy is not needed."[28]

" The plan might have been arranged just half a minute before the actual beating started, e.g., as soon as the assailants arrived on the spot armed with lathis and got engaged in the common act of hitting their victim with lathis."[29]

" As common intention can be formed only(?) a moment before the doing of the criminal act the sudden-

[27] I.L.R. 1947 Mad. 425.
[28] *Gajrajsingh* v. *Emperor* 47 Cr.L.J. 714.
[29] Per Sankar Saran J. in 1952 1 All. 639 at page 692.

ness of a quarrel or fight does not by itself negative the existence of a common intention."[30]

"The common intention required under section 34, Indian Penal Code, pre-supposes a pre-arranged plan which should precede the commission of the crime, but the pre-arranged plan need not precede the commission of the crime by great length of time. All that is required is that the pre-arranged plan must have come into existence before the crime is committed. The pre-arranged plan can come into existence the moment one person calls another for attacking a third, even though the length of time between calling and the commission of a crime was only a few seconds."[31] Similarly in *Anna and others* v. *State,*[32] it is observed: "In order to come to a conclusion of common intention and to hold a person guilty for the act of another, there ought to be pre-arranged plan and the act must have been done in furtherance of the common intention. The plan may have been made on the spot. There is no lag of time necessary for a pre-arranged plan."[33]

It is submitted that in all such cases the fiction of a pre-arranged plan made out a minute before "or a few seconds" before the commission of the criminal act, from which the further inference of common intention is to be deduced is avoidable. The Court can as well straightaway infer common intention from the facts. The problem of inferring common intention is already a difficult one in the case of sudden occurrences. As observed in *Kinaramdas* v. *The State*[34] "In cases where there is pre-meditation, some kind of pre-concerted action, some previous design and several persons combine and act together they may be easily deemed to be intending the natural consequences of their combined acts.

[30] *Bashir* v. *The State* 1953 Cr.L.J. 1505.
[31] *Jwala and another* v. *The State* 1954 Cr.L.J. 720.
[32] 1956 Cr.L.J. 887.
[33] *See* also 1955 A.I.R. S.C. 216.
[34] 1955 Cr.L.J. 57.

But where the occurrence is sudden, there is commonly a cry for assistance or a call for assault or the doing of a certain act which is criminal. The person who asks for assistance or who gives a certain direction or a certain order cannot possibly be sure of the reaction of others. All those who come may come with different designs and different intentions. If they immediately engage in the transaction, it will be an extremely difficult task to discover whether they had any common intention from their acts alone". It is submitted why add to this the additional complexity of finding a pre-arranged plan?

The purpose of proving pre-meditation, pre-arranged plan or prior concert is only to prove that the intention is '*common*', and not merely similar, i.e., that it is shared. Then, when a common object is required to be proved in the case of an unlawful assembly under section 141, pre-concert should equally be necessary to make out that the object is common. But it is held by the Supreme Court in *Motidas* v. *State of Bihar* [35] and in *Sukha and others* v. *The State of Rajasthan* [36] that no prior concert or meeting of minds is necessary before the attack in the case of an unlawful assembly. It is observed in these cases "The distinction between the common intention required by section 34 and the common object set out in section 149 lies just there. In a case under section 149, there need not be a prior meeting of minds. It is enough that each has the same object in view and that their number is five or more and that they act as an assembly to achieve that object".[37] Again the Supreme Court says "Previous concert is not necessary. The common object required by section 141 differs from the common intention required by section 34 in this respect".[38]

One may end the discussion with the observation "Though its language (section 34) is plain and the words

[35] 1954 Cr.L.J. 1708 (S.C.).
[36] 1956 Cr.L.J. 923 (S.C.).
[37] *Ibid.*
[38] 1954 Cr.L.J. 1708 (S.C.).

used are of every day use the section is interpreted by different judges in different manners. We think that all the trouble and confusion are caused by ignoring the words used in the section or by interpolating new words ".[89]

[89] *Bashir* v. *The State* 1953 Cr.L.J. 1505 at page 1507.

GOVERNMENTAL LIABILITY FOR TORTS IN INDIA.

C. RAJARAMAN.

The purpose of this article is to attempt a brief survey of the question of Governmental liability for torts in India and to compare it with the position in certain foreign countries.

Since the Law of Torts in India is substantially based on the English Law of Torts with a few variations therefrom on the ground of a difference in local conditions, the English Law on the liability of the Crown may first be stated.

According to the English Common Law, there was in general no remedy against the Crown in tort by reason of the maxim "The King can do no wrong". So it was not possible to sue the Crown in tort either for wrongs it had expressly authorized or for wrongs committed by its servants in the course of their employment, although the individual wrongdoer could be sued in his personal capacity (not as servant of the Crown or of the Government department). In practice, the Treasury might as a matter of grace undertake to satisfy any judgment awarded against a Crown servant for torts committed in the course of his employment. Government departments enjoyed the immunity of the Crown except where statutory exceptions were created such as by the Ministry of Transport Act, 1919. The law on this subject has been greatly changed by the Crown Proceedings Act, 1947, which has, subject to a few exceptions, placed the Crown in the same position as if it were a private person of full age and capacity. Section 2 (1) of the Act provides as follows:—

"Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort, to which,

if it were a private person of full age and capacity, it would be subject—

(*a*) in respect of torts committed by its servants or agents;

(*b*) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and

(*c*) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property."

Liability in Tort also extends to breach by the Crown of a statutory duty.

It is to be noted that nothing in the Act authorizes proceedings against His Majesty in his personal capacity (section 40) or affects powers or authorities exercisable by virtue of the Prerogative of the Crown or conferred upon the Crown by Statute [section 11 (1)]. The Crown is not to be held liable for wrongs committed by any person in the exercise of judicial functions.

With regard to the United States of America, the principle of immunity of the State from tortious liability, unless it consented to be sued, was followed until it was changed by The Federal Tort Claims Act, 1946, which states that:—

"The United States shall be liable respecting the provisions of its title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances."

Liability under the statute is limited to:—

"Damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage. . . ."

But there are some important exceptions to the rule.

Liability under The Federal Tort Claims Act, 1946, does not extend to:—

(1) Claims arising out of intentional wrongs such as assault, battery, false imprisonment, malicious prosecution, libel, slander, misrepresentation, deceit, interference with contractual rights.

(2) Claims arising out of an act or omission of a Government official, 'exercising due care' in the execution of a statute whether valid or not.

(3) Claims based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government whether or not the discretion involved be abused.

(4) Claims arising out of taxation.

(5) Claims arising out of military operations during war time. Besides, the United States is liable only for compensatory damages and punitive damages are excluded. Both according to English and American Law a judge is not liable for acts done by him in the performance of his duties. But there is a difference as to the liability of the Government. Whereas the Crown Proceedings Act, 1947, exempts the Crown for wrongs committed by a person in the exercise of judicial functions, in the United States, a Statute of 1938 [1], provides a remedy against the United States to a person convicted of any crime of offence [2] who having been sentenced to imprisonment has served part of the imprisonment and who shall subsequently be found not guilty of the crime for which he was convicted or shall receive a pardon on the ground of innocence, if it shall appear that such person did not commit any of the acts with which he was charged. The remedy available is limited to pecuniary damages to the maximum of five thousand dollars. [2]

As far as France is concerned, until the nineteenth century the notion of immunity of the State from

[1] 52 Stat. 438.

[2] In India neither the Judge personally (Judicial Officers Protection Act of 1850) nor the Government is liable.

responsibility for acts done by its agents prevailed. But since 1870, this rule has been abrogated. French law of tortious liability of the Government differs from the Anglo-American Law in that there is a separation of judicial and administrative authorities. Suits arising out of administrative acts of public officials are heard by the Conseil d'Etat. which is an Administrative Tribunal, and not by the Judicial Tribunals or Civil Courts.

A distinction is made between '*faute personelle*' or personal fault of an official, i.e., one committed by him outside the scope of his employment, or done wilfully or maliciously and '*faute de service*' or service connected fault, i.e., a wrongful act committed within the scope of his employment. For the former acts the official only is personally liable, while for the latter the State accepts responsibility, the suit being heard by the Conseil d'Etat.

Once *faute de service* is established, it would appear that the liability of the Government is wider than that in England or the United States. *Faute de service* is wider than the English idea of scope of employment and includes improper acts as well as wrongful acts.

India.—The corresponding position in India is stated in Article 300 of the Constitution of India which provides as follows:—

"The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

Article 300 says that the law applicable now, will be the law that prevailed before the passing of the present Constitution. The law before this date was regulated

by the provisions of the successive Government of India Acts[3] beginning from the Act of 1858. Section 65 of the Government of India Act of 1858, constituted the Secretary of State for India in Council as a body corporate for the purposes of suing and being sued and provided as follows:—

"Every person shall have the same remedies against the Secretary of State for India in Council as he might have had against the East India Company, if the Government of India Act, 1858, had not been passed."

This provision was reproduced in the Government of India Acts of 1915 and 1919 (section 32), while the Government of India Act of 1935, in section 176 provided that the Federation of India and the Provincial Governments could be sued in like cases where the Secretary of State might be sued under the previous Acts.

So even now, to decide whether a suit would lie against the Government for torts committed by its servants or agents we have to ascertain whether a suit could have been brought in the same circumstances against the East India Company if the case had arisen prior to 1858.

The East India Company was originally a mercantile concern, but in 1765 it acquired the Diwani from the Moghul Emperor Shah Alam. This gave it the fiscal administration of that part of the country which it covered and in connexion with the fiscal administration it gave also in substance the power of civil justice and from that time until 1858 when the British Crown assumed sovereignty over India, the company had a dual character, namely, that of a trader as well as a sovereign. By the Charter Act of 1853, the Company held the Government of India in trust for the British Crown.

The immunity of the Crown in England from being sued was extended to the East India Company in its

[3] Section 65 of the Government of India Act of 1858.
Section 32 of the Government of India Act of 1919.
Section 176 of the Government of India Act of 1935.

sovereign capacity in the exercise of its "sovereign powers."

One of the earliest leading cases on this subject was that of the *Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State for India.*[4] In this case, the plaintiff sought to recover damages on account of injury caused to his horse owing to the negligence of certain servants of the Government who were employed in connection with the dockyard at Kidderpore and who were engaged in carrying an iron funnel casing to be placed on board a steamer. On the question whether the State could be held liable, Sir Barnes Peacock C.J. observed "There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them." For the latter kind of acts the Secretary of State for India could be sued just as the East India Company could be sued for torts committed by its servants in the course of transactions in which it engaged in its mercantile capacity. He gave as instances of such transactions, maintenance of dockyards, carrying persons on railways or conveying messages by telegraph. Since the above case fell within the category of a private undertaking the Secretary of State for India was held liable. In *Secretary of State for India in Council* v. *Moment*,[5] the Government of Burma had a dispute with an individual about the ownership of certain landed property and the suit was for damages for wrongful interference with the plaintiff's property. While deciding that a local Act which purported to curtail the rights to sue the Secretary of State for India was *ultra vires,* it was held that a suit for damages for wrongful interference with the plaintiff's property would have lain against the East India Company and so the Government could be sued for the same reason. A petition of right

[4] (1861) 5 Bom. H.C.R. App. 1.
[5] (1912) I.L.R. 40 Cal. 391.

would have been available in England in the same circumstances. Similarly an action was allowed for damages for injury sustained by the fall of a gate in a public garden maintained by the Government [6] and in a Nagpur case, [7] the Government were held liable for loss caused by the improper interference of a Forest Range Officer with the removal of timber by the plaintiff who had purchased a forest coupe. So also an action was allowed where the plaintiff was arrested by a railway servant on his failure to disclose his name and address. [8]

Turning now to the liability of the Government for acts done in its sovereign capacity, some observations of Sir Barnes Peacock in the P. & O. Steam Navigation case suggest that the Government cannot be sued in respect of acts done by its servants in the exercise of its sovereign powers. "But when an act is done, or a contract is entered into in the exercise of powers usually called sovereign powers by which we mean powers which cannot be lawfully exercised except by a sovereign or private individual delegated by a sovereign to exercise them, no action will lie." He observed that the East India Company would not have been liable for any act done by any of its officers or soldiers in carrying on hostilities or for the act of any of its naval officers in seizing as prize, property of a subject under the supposition that it was the property of the enemy. Nor for the act done by a military or naval officer or by any soldier or sailor whilst engaged in military or naval duty, nor for any act by any of its officers or servants in the exercise of judicial functions. In many of such cases an action would not lie even against the person who actually committed the act. The interpretation of what is meant by sovereign functions or powers has given rise to some difficulty and considerable variation of opinion among the Indian Courts.

[6] *Wyllie* v. *Secretary of State* (1929) III I.C. 549 (1928) Lah. 346.
[7] *Secretary of State* v. *Sheoramjee* I.L.R. (1949) Nag. 875.
[8] *Maharaja Bose* v. *The Governor-General in Council* (1952) A.I.R. Cal. 342.

It is agreed that for a real Act of State neither the Government nor the individual who did the act can be sued. An act of State has been defined as "An act of the executive as a matter of policy performed in the course of its relations with another State, including its relations with the subjects of the latter State unless they are temporarily within the allegiance of the Crown".[9] More especially as far as tort is concerned, Sir Fitz James Stephen[10] defines Act of State as "An act injurious to the person or to the property of some person who is not at the time of that act a subject of His Majesty; which act is done by any representative of His Majesty's authority, civil or military, and is either previously sanctioned or subsequently ratified by His Majesty." In *Secretary of State for India* v. *Kamatchee Boye Saheba*[11] also known as the Tanjore Raj case the Privy Council held that the annexation of a *raj* on behalf of the British Crown by the East Indian Company was an Act of State. Lord Kingsdown observed: "The transactions of independent States between each other are governed by other laws than those which municipal courts administer. Such courts have neither the means of doing what is right nor the power of enforcing any decisions they may make."

The legal title to an Act of State is not derived from municipal law. Further there cannot be an Act of State between a sovereign and his own subjects.[12]

In Forrester v. *The Secretary of State,*[13] the Government had recovered the lands held by one Begum Sumaroo as a Jagirdar, after her death and the plaintiff filed a suit to recover the property on the basis of a deed of will executed by her. It was pleaded that the Begum was an independent or *quasi*-independent sovereign and that the resumption and seizure were Acts of State the

[9] Wade in (1934). 15 B.Y.I.L. at page 103.

[10] Stephen History of Criminal Law.

[11] (1859) 7 M.I.A. 476.

[12] *Buron* v. *Denman* (1848) 2. Ex. 167; *Johnstone* v. *Pedlar* (1921) 2. A.C. 262.

[13] (1871-72) L.R.I.A. Sup. Vol. page 10.

propriety and validity of which were not cognizable by a municipal court. It was held by the Privy Council that as Begum Sumaroo was not a Sovereign princess and the act of resumption was done under colour of legal title, of lands previously held from Government by a subject, it was not an Act of State and the suit was consequently triable by a Civil Court.

Apart from Acts of State whether a suit would lie against the Government for other acts done by them in the exercise of sovereign powers was a matter of some doubt. In some of the early cases arising subsequent to the P. & O. Steam Navigation Company, case the view was taken that an act done in connection with Governmental powers or powers which could not be lawfully exercised save by the sovereign or an individual delegated by the sovereign to exercise such powers was a Sovereign Act for which a suit will not lie against the Government. In *Secretary of State for India* v. *Cockraft*[14] where the plaintiff was injured in a carriage accident due to the negligent stacking of gravel on a military road maintained by the Government it was held that maintenance of roads, especially a military road is one of the functions of Government carried on in the exercise of its sovereign powers and is not an undertaking which might have been carried on by private persons, and so the plaintiff was held to have no cause of action against the Secretary of State for India. A suggestion was made in this case that the distinction between sovereign powers and powers exercisable by private individuals is that in the former case no question of consideration comes in, whereas the essence of the latter is that some profit is secured or some special injury is inflicted in the exercise of the individual rights.

In *Nobin Chunder Dey* v. *Secretary of State for India*[15] the plaintiff had deposited money, in order to get a licence for *ganja* shops and he complained that

[14] (1914) I.L.R. 39 Mad. 351.
[15] (1875) I.L.R. I Cal. 11.

he had not been given the licence, that his money had not been returned to him and that he had suffered damage for want of the licence. The court on appeal held that issuing a licence and taking excise duty were matters done entirely in the exercise of sovereign powers. This was a wrongful detention of an ascertained sum of money for which a petition of Right would have been available in England. This decision purported to extend to the Government of India an immunity more extensive than that enjoyed by the Crown in England and is considered by subsequent authorities to be erroneous.

So also in *McInerny* v. *Secretary of State for India* [16] a plaintiff who had suffered personal injuries from colliding with a post put up at the edge of the maidan in Calcutta was held to have no action.

In *Secretary of State for India in Council* v. *Shreegobinda Chaudhuri* [17] a suit was brought by the plaintiff for damages for the wrong committed in the execution of his duty by a manager appointed by the Court of Wards under the Court of Wards Act, 1879. It was held that the management of a proprietory estate by the Court of Wards was an act done in the exercise of sovereign powers, public interest and interest of revenue being clearly the main objects of the powers exercised, and hence no suit would lie against the Government. Similarly the use of land as a practice bombing ground [18] by the army in the course of which the plaintiff was injured by an unexploded bomb was considered to be a sovereign function. A rather extreme extension of the term Sovereign Act is found in the case of *Etti* v. *Secretary of State for India.* [19] There, the plaintiff took his infant son to the Government Hospital for Women and Children at Egmore, Madras. Some days later on his returning he found his child had been taken away by some one else by mistake. The plaintiff

[16] (1911) I.L.R. 38 Cal. 707.
[17] (1932) 39 I.L.R. Cal. 1289.
[18] *Secretary of State* v. *Nagarao* I.L.R. 1943 Nag. 511.
[19] I.L.R. (1939) Mad. 843.

being unable to find his child brought a suit against the Secretary of State for negligence on the part of the hospital authorities. The court held that the Government in maintaining the hospital out of public revenues for the benefit of the public was discharging a proper function of the Government in the exercise of its sovereign powers and was not engaged in a commercial undertaking, and so no suit would lie.

Even the test that a Sovereign Act is a function which only a Government can perform fails in this case, as the maintenance of a hospital is an act which an individual not invested with governmental powers can undertake. The reasons that the hospital was maintained out of public revenues and for the public benefit and hence a sovereign function would seem to be unsatisfactory.

All the above cases illustrate the fact that a very wide interpretation was given to what is meant by a Sovereign Act. But a departure was made from this view in *Secretary of State for India* v. *Hari Bhanji*[20], where it was stated that the only acts done by the Government which the municipal courts are debarred from taking cognizance of are acts done in the exercise of sovereign powers which do not profess to be justified by municipal law, i.e., Acts of State. But where an act complained of is professedly done under colour of municipal law or in the exercise of powers conferred by statute, the fact that it is done by the Sovereign power and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the Civil Courts. In this case it was held that a suit would lie against the Secretary of State for an alleged illegal levy of customs duty under the Customs Act. (The case of *Nobin Chunder Dey* v. *The Secretary of State* was dissented from.) The cases of *Secretary of State* v. *Kamatchi Boye Saheba* and *Forrester* v. *Secretary of State for India* were contrasted. In the last

[20] (1882) (5) I.L.R. Mad. 273.

case where property was taken possession of by Government the question was whether Government in taking possession of the property was exercising an Act of State or purporting to do something which it was entitled to do under municipal law, in which latter case the act was examinable by the municipal courts. It was also stated that the P. & O. Steam Navigation case although it was authority for the fact that actions would lie against the Government for acts done in its private capacity did not express any opinion that all acts done in the exercise of sovereign functions would enjoy immunity. The decision in *Hari Bhanji's* case was followed in *Rameswar Singh* v. *Secretary of State* [21] in the matter of the illegal acquisition of land under the Land Acquisition Act.

The views expressed in *Hari Bhanji's* case have been approved by the Bombay High Court in *P. V. Rao* v. *Khushaldas S. Advani* [22] and on appeal by the Supreme Court in *Province of Bombay* v. *Khushaldas S. Advani.* [23] In this case an officer of the Bombay Government who had issued an order for the requisition of property under a Bombay Ordinance (Bombay Land Requisition Ordinance, 1947) contended in an application to quash that order that the act was done by Government as a Sovereign authority (and was an act which cannot be done by a private individual but only by an authority which is exercising sovereign powers and was therefore outside the purview of municipal courts). In negativing this contention it was observed by Chagla C.J.: "An Act of State is different fundamentally from an Act of Sovereign authority. An Act of State operates extra-territorially. Its legal title is not any municipal law but the over-riding sovereignty of the State. It does not deal with the subjects of the State but deals with aliens or foreigners who cannot seek the protection of the municipal law. It is difficult to conceive of an Act of State as between a sovereign and his subjects. If

[21] (1907) I.L.R. 34 Cal. 470.
[22] (1949) (51) Bom. L.R. 342.
[23] (1950) S.C.J. (1950) Vol. 13, page 451.

Government justifies its acts under colour of title and that title arises from a municipal law, that act can never be an Act of State. Its legality and validity must be tested by municipal law and in municipal Courts." [24]

In the above case some observations made by Grey C.J., in *The Bank of Bengal* v. *The United Company*[25] regarding the legal position of the East India Company were quoted. This was an action upon an instrument which purported to be a promissory note of the company; it was a forged note but had been initialled as valid by a servant of the Company in the course of his duty. The plea that the Sovereignty of the Company would have prevented them from being sued was rejected. The proposition that the Company could not be sued because of their having something of a sovereign character was not accepted. "It is only the sovereign himself who cannot be sued and that sovereign is the King of the United Kingdom. . . ."

"Although the company are invested with powers which usually abide in the sovereign, yet they are none of them sovereign in the hands of the company, who are in every respect subject to the control of him who alone is the sovereign, and they are also subject to the control of Parliament. The confusion arises as it seems to me, from its not having been distinctly perceived that the powers which are usually called sovereign and which are sovereign while they remain in the sovereign himself, cannot, except in a colloquial and inaccurate use of language, be considered to constitute those persons sovereign who exercise them in subordination to him who is in fact the only sovereign." . . . "there is nothing whatever in the political right of the East India Company which can make it wrong to sue them in a municipal court, even as to matters of Government. It is the king alone who has that exemption and the company stand in a similar situation to that in which all individuals are

[24] (1950) S.C.J. (1950) Vol. 13 at page 395.
[25] (1881) Bignell Rep. 87 at page 119.

placed who are Governors of Colonies. They are not necessarily exempt from actions on account of any sovereign character belonging to them, but even as to matters of Government they may be liable to an action, if it has been the intention of the statute to make them so liable."

It is apparent from this statement that the court did not consider that the immunity of the Crown in England which is an attribute of Sovereignty, extended to the East India Company.

The Supreme Court in *Province of Bombay* v. *Khushaldas S. Advani* confirmed the view taken by the Bombay High Court in *P. V. Rao* v. *Khushaldas S. Advani*. While accepting the position that the East India Company was invested with functions of a twofold character, i.e., mercantile function and delegated powers to acquire, retain and govern territories, to raise and maintain armies and to make peace and war with the native power in India, it was observed [26] that the liability of the East India Company to be sued was not restricted altogether to claims arising out of undertakings which might be carried on by private persons; but other claims if not arising out of Acts of State could be entertained by civil courts if the acts were done under sanction of municipal law and in exercise of powers conferred by such law. In this connexion some observations made by Their Lordships of the Privy Council in *Venkata* v. *Secretary of State* [27] may be stated.

" . . . it would not be too much to assume that if the Peninsular case laid down that the right of the subject to sue the Government was limited to any consideration as to whether the East India Company, could or could not have been sued as a trading corporation, that was not the correct statement of the law."

To attempt to reconcile all the decisions about the suability of the Government in India may be a difficult

[26] Mukherjea J. at page 490.
[27] A.I.R. (1937) P.C. 31.

task. But the following observations may be made: (1) All the cases are agreed that the Government is liable for torts committed by its servants in the course of a private undertaking, i.e., a function which the East India Company would have performed in its mercantile capacity. (2) There is unanimity of opinion that for an Act of State the Government is not liable. (3) The difference of opinion between the authorities is as to whether the Government can be sued for acts done in the exercise of sovereign powers (apart from Acts of State). One line of cases takes the view that a suit will not lie against the Government for any act done in the exercise of sovereign functions, i.e., an act which a private individual cannot perform, but one which only a Government invested with sovereign powers can perform. These cases probably proceed on the assumption that the doctrine of the immunity of the Crown in England should be extended to the East India Company for acts done by them in their sovereign capacity. But some of these cases appear to have raised all Governmental acts done in the exercise of sovereign power even against its own subjects to the status of Acts of State which is contrary to the prevailing view.[28] The other line of cases beginning from *Hari Bhanji's* case say that only an Act of State is not justiciable by municipal courts, but for acts done by Government under colour of municipal law an action will lie even though it is an act done in the exercise of sovereign functions. The view taken by the second line of cases has now received the approval of the Supreme Court in *Advani's* case, and it is submitted that this view is preferable.

Consequently it may be stated that a subject can sue the Government in tort in respect of all acts except an Act of State. This would appear to be the result of the recent decision of the Supreme Court in *Province of Bombay* v. *Khushaldass Advani*. [29]

[28] *Eshugbai* v. *Government of Nigeria* (1931) A.C. 662.
[29] *Ibid.*

But some doubts on this proposition would seem to arise from the opinion expressed in *Ross* v. *Secretary of State for India*[30] that the Government is not liable for a wrong done by its servants in the course of their official duties imposed on them by a statute unless the wrong was expressly authorized or ratified by it. In this case a District Magistrate had made an order under an enactment directing the closing of a certain labour depot in connexion with recruitment of workmen for the Assam tea gardens. The order directing the closing of the depot was *ultra vires*. This was clearly not an act done in connexion with any private or mercantile undertaking of the Government. Mr. Justice Wallis did not agree that no suit would lie against the Government except in connexion with a private undertaking but his decision is apparently based upon the general maxim found in Story on Agency that Government itself is not responsible for the "misfeasances, or wrongs or negligence or omissions of duty of the subordinate officers or agents engaged in the public service, for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations in endless embarrassments and difficulties and losses which would be subversive of the public interest." Probably the principle underlying this rule was that the act was done by the official in the exercise of duties imposed on him by law or statute and not by any implied authority derived from the Government. Following this rule it has been held that the Government is not liable for an improper arrest by a police officer[31] and where loss was caused when a Sub-Deputy Collector paid the sale-proceeds of a taluk to a person not entitled to it.[32] The rule was followed in *Uday Chand* v. *Province of Bengal*[33] where it was held that the Government was not liable

[30] (1913) I.L.R. 37 Mad. 55.
[31] (1944) I.M.L.J. 399: Maharani of Nabha's case.
[32] (1935) 37 C.W.N. 951: *Secretary of State* v. *Ramanath Bhatta*.
[33] (1947) 51 C.W.N.

where a Collector holding a sale under the Putni Regulation, 1819, negligently paid out the sale-proceeds thereof to a person who was not entitled to the same. So also where due to negligence in regard to the custody of the plaintiff's property it was stolen.[34]

It is submitted that the above rule is unsatisfactory since it practically nullifies the subject's rights against the Government. If the basis of the rule is that unless the Government impliedly authorizes the act it is not liable, then the reasoning is unsound because the basis of vicarious liability is not implied authority given by the master but control by the master.

The United States however had accepted the principle that a body which appoints an officer is not liable for torts committed by him while carrying out duties imposed upon him by law and English law had also followed it in some cases. In *Stanbury* v. *Exeter Corporation*, [35] it was held that the defendants could not be sued for a tort committed by a Sanitary Inspector appointed by them, in seizing sheep, where the duty was imposed upon him directly by delegated legislation. So also in *Fisher* v. *Oldham Corporation*.[36] a local authority was held not liable for a wrongful arrest by a police officer. But it is interesting to note that a change has been made by section 2 (3) of the Crown Proceedings Act, 1947, which provides:—

"Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown."

[34] (1950) All.L.J. 46.
[35] (1905) 2 K.B. 838.
[36] (1930) 2. K.B. 264.

This provision which makes the Government liable incorporates the better point of view as suggested above.

CONCLUSIONS.

1. If the decision in *State of Bombay* v. *Khushaldas S. Advani* is adopted, it follows that in India an individual can maintain an action in tort against the Government for (1) acts done by it in its private capacity, (2) acts done in Governmental capacity under colour of municipal law or statute.

2. It is submitted that after the passing of the Constitution, all executive powers of the President and the Government are derived from the Constitution or other statutes (in conformity with the provisions of the Constitution) and there is no prerogative powers or inherent powers. Even if there is an inherent power to carry on trade activities in pursuance of the policy which the executive Government has formulated with the tacit support of the majority in the legislature, where it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such a course would have to be passed.

3. The rights of the citizen against the State in India in tort are wider than that obtaining in England or the United States. The Crown Proceedings Act, 1947, for instance provides that nothing in the Act shall affect any acts done in exercise of the prerogative of the Crown.

4. The unsatisfactory feature of Article 300 of the Constitution is that it does not lay down the conditions under which a suit woud lie against the Government but refers one back to the position in the time of the East India Company. The dual nature of the functions of the Company and the importation of the doctrine of the immunity of the king from liability in tort has led to a difference of views.

5. It is suggested that a statute on the lines of the Crown Proceedings Act may be passed in India to prescribe the conditions under which a suit will lie against the Government, though not for the purpose of conferring a right to sue, which as stated, is already possessed by the citizen.

JUDICIAL REVIEW IN INDIA : A RETROSPECT

T. S. RAMA RAO,

The makers of the Indian Constitution effected a decisive break from the English common law tradition when they vested in the Judiciary the power to annul legislative acts for violation of the Constitution. Very few constitutions in the world have provided for such review of legislative measures by the Courts but none has gone to the same extent in maintaining judicial supremacy as the United States Constitution with its famous due process clause, which has indeed served as a model to the other constitutions. The reason for this adoption of the American pattern in India is partly historical. During their fight with the British regime for Independence, the Indian leaders were naturally impressed with the need for protection of the citizen against the State and readily turned to the American solution of a Bill of Rights, as worthy of emulation in this country. When the Constituent Assembly was set up in 1946, the problem of the minorities, which then loomed large in the political horizon, provided a further impetus to the incorporation of Fundamental Rights in the Constitution. In fact, the original Draft Constitution expressly incorporated a "due process of law" clause. However, with the partition of India and the communal strife and blood bath that ensued, the whole emphasis in the Constituent Assembly changed from guaranteeing indefeasible rights for the citizen to the need for providing adequate security to the State against subversive elements. The first casualty of this change in mood was the due process clause, which was speedily replaced by the Drafting Committee with the present Article 21 that "no person shall be deprived of his life or personal liberty except *according to procedure established by law*", which thus offers absolutely no protection for a citizen's liberty against the legislature

(italics mine). The erstwhile desire to adopt the American doctrine of Judicial review seems to have been replaced by a profound distrust in the Judiciary and even by an unwillingness to confer any valuable rights especially in the field of property rights to the citizen as against the legislature. The Constitution as it finally emerged provided for a few truncated Fundamental Rights, circumscribed by a number of detailed restrictions and exceptions, which were introduced as a protection "against judicial vagaries." [1] The resultant verbosity has been doubly unfortunate. It has led not only to a certain formal inelegance [2] but to a complete absence of clarity. To cite but one example, the Constitution has provided a double-barrelled "protection" (or is it an onslaught?) of property rights in two Articles 19 and 31, the task of reconciliation of which is difficult and has led to some judicial bungling and two constitutional amendments.

While the constitution-makers have narrowed the ambit of the substantive fundamental rights, they have, in curious contrast, conferred a very wide remedial jurisdiction on the Supreme Court and the High Courts in the matter of enforcing such negligible rights—a fact which reminds one of the adage about the mountain labouring hard to produce finally a tiny mouse. This is probably ascribable to the preponderance of the lawyer-element in the Constituent Assembly. The Supreme Court and the High Courts are enabled by Articles 32 and 226 to issue directions or writs including the High Prerogative Writs of English Law to enforce fundamental rights, and the High Courts are entitled in addition to issue them against any person within their territorial jurisdiction and "for any other purpose." Besides Article 227

[1] *See* speech of Sir Alladi Krishnaswami Iyer. Proceedings of the Constituent Assembly, Volume 2, page 209.

[2] From the point of view of constitutional mechanics, the ideal would be, to borrow an expression used by Sri M. Anantanarayanan, "the equivalence in the planes of expression." Where a general right is followed by an exception, the latter should also be on the same plane, viz., "an expression of a principle, an abstract and valid concept of qualification." *See* his "Some Juristic Norms and the Indian Constitution", Indian Year Book of International Affairs (I.Y.B.I.A.), Volume V, page 107.

gives a general power of superintendence over subordinate Courts and Tribunals to the High Courts and Article 136 gives an *appellate* jurisdiction to the Supreme Court against the decision of any Court or Tribunal in India. It is interesting to note in this connexion that the *appellate* jurisdiction of the American Supreme Court is derived not from the Constitution but from Acts of Congress only. In 1869, the United States Congress actually prevented the Supreme Court from passing upon the constitutionality of the Reconstruction Acts by repealing the latter's jurisdiction over a case which had been argued and was ready for decision. [3] While our Supreme Court has probably the *widest* possible jurisdiction of all the Judicial Tribunals in the world, it is far less *powerful* than the American Supreme Court, because of the narrow scope for its supremacy over the legislature.

Judicial Review in Practice

While a Constitution primarily fixes the boundaries of judicial power, they never remain static, but broaden out or contract from time to time depending upon factors which are essentially political. The judiciary is the final authority in the matter of interpretation of the Constitution and its decision is binding on the Executive, the Legislature and the citizens unless the Constitution itself is amended. Hence there is a universal tendency for the judiciary to expand its powers, if the procedure for constitutional amendment is rigid, or if such expansion coincides with the interests of the majority of the people. Indian constitutional history after 1950 might be broadly divided into three distinct periods, for a study of the evolution of judicial review in this country: (1) 1950-51, the period of strict interpretation, (2) 1952-55, the period of expansion and (3) the period after 1955, i.e., after the Constitution (Fourth Amendment) Act, 1955—the period of retreat.

[3] Ex Parte McCardle, 7 Wall 506.

I. The Period of Strict Interpretation.

In its very first constitutional decision, the celebrated Gopalan case, the Supreme Court started on a modest and self-distrustful note regarding its powers of review over legislative enactments. The validity of the Preventive Detention Act, 1950 was impugned in the case, but the Judges, while making lugubrious references to the odiousness of detention without trial, pleaded their utter helplessness in the matter, as the Constitution has specifically sanctioned preventive detention in Article 22. They refused to read the due process clause into Article 21 (" No person shall be deprived of his life or personal liberty except according to procedure established by law ") both on a literal interpretation of the article and on the ground that the due process clause which was inserted in the Draft Constitution was specifically removed by a Committee of the Constituent Assembly. The decision has been criticised by eminent writers on several grounds,[5] but if the intention of the framers of the Constitution is to be the sole criterion of interpretation, it is difficult to see how the judgment could have been otherwise. It was held that the Court can examine only the relevancy of the grounds of detention to the object of the legislation but not their sufficiency, and in this the Court purported to follow *Liversidge* v. *Anderson*[6] and *Rex.* v. *Halliday.* It is true, as pointed out by Prof. Alexandrowicz, that these decisions are emergency cases while Gopalan's case was decided in peace time. However, if the British Parliament had authorized preventive detention in normal times of peace, it might be an " unconstitutional " Act,[8] but the Courts are hardly likely to go into the

[4] 1950 S.C.J. 174.

[5] *See* Prof. Alexandrowicz—" The Supreme Court of India as a Habeas Corpus Bench ", Madras University Journal, January 1952; Prof. Bernard Schwartz—" A comparative view of the Gopalan case " in (1950) Indian Law Review 278, etc.

[6] 1942 A.C. 206.

[7] 1917 A.C. 260.

[8] " Unconstitutional " in the sense that it would be changing the Constitution itself. *See* the views expressed by Sir Alfred Denning in " Freedom under the Law " pages 12-15.

sufficiency of the grounds of detention even then. Preventive detention, after all, is based upon mere suspicion, and is resorted to with a view to prevent a person from engaging in prejudicial activities. Hence by its very nature, it can only be left to the discretion of the Executive and not of the Courts, as has been pointed out by Lord Finlay in *Rex* v. *Halliday.*[9] That this is the view of the Constitution-makers also, is clear from Article 22 (6), which authorizes the Executive to withhold from informing the detenu, facts which it considers against the public interest to disclose.

It should, however, be noted in this connection that the Supreme Court of Burma has held in *Tinsa Maw Naing* v. *Commissioner of Police* [10] that an objective test is applicable to preventive detention cases, under the Burmese Public Order Preservation Act. It seems to take the view that an official authorizing detention under the statute acts in a quasi-judicial capacity thus making himself amenable to certiorari [11] and that hence it could examine whether the facts were such as could have satisfied the authority passing the order. Thus a distinction was drawn between reasonable satisfaction and mere apprehension born of vague anticipation. However, the Court also took the view that it was not entitled to substitute its conclusions of facts for the Executive's. Such a review falls short of an objective test, but seems wider than that permitted under the Gopalan case. It is not known what the Burmese Court's reaction would have been to a case of detention based on facts which the detaining authority might consider not to be in the public interest to disclose.

Anyhow, Article 22 of the Indian Constitution envisages the vesting of unlimited discretion in the Executive in the matter of preventive detention subject to a few specified procedural safeguards and in cases of

[9] 1917 A.C. 260 at 269.

[10] Burma Law Reports 1950 (S.C.) 17.

[11] *See* "Some Aspects of Burmese Constitutional Law" by Sri N. A. Subramanian, I.Y.B.I.A., Vol. V, pages 123 at 142.

detention for a period longer than three months, subject to a decision of an Advisory Board that "there is *in its opinion* sufficient cause for such detention." Thus *prima facie,* the Article excludes the objective test. Besides, even if we assume as the Burmese Supreme Court does, that the detaining authority's function is a quasi-judicial one, considering the nature of preventive detention—detention on suspicion, certiorari could at best require only bona fides on the part of the authority, and relevancy to the object of the statute. And these, even the Indian Supreme Court considers essential. Thus it is respectfully submitted that the distinction between the objective and the subjective tests in the matter of preventive detention would amount to a mere play of words unless the Court is prepared to go the whole hog and substitute its satisfaction for that of the Executive.

While the Supreme Court has stuck to the literal interpretation of the Constitution in the subsequent cases on preventive detention, it has leaned in favour of personal liberty by insisting on the strict compliance with the procedural safeguards guaranteed to the detenu by Article 22. Thus the Court examined the grounds communicated to the detenu to see if they were *sufficient* to enable him to make an effective representation against the order of detention, under Article 22 (5). [12] The bona fides of the order of detention is always examinable. Further even if one of the several grounds of detention communicated to the detenu is irrelevant [13] or vague [14] or admittedly non-existent, [15] the Court has set aside the order of detention, because to do otherwise would be to substitute its judgment to that of the detaining authority in examining whether the other grounds of detention are sufficient for the purpose. If the Court could not analyse the sufficiency of grounds at the instance of the detenu, it

[12] *State of Bombay* v. *A. B. Vaidya,* 1951 S.C.J. 208.
[13] *Sodhi Shamsher Singh* v. *Pepsu,* A.I.R. 1954 S.C. 276.
[14] *Dr. Bharadwaj* v. *State of Delhi* (1953) S.C.J. 444.
[15] *Shibban Lal Saksena* v. *State of U.P.,* A.I.R. 1954 S.C. 179.

would not do so to oblige the Government to get over a technical difficulty.

The rule of literal construction is evident in the decisions of the Supreme Court concerning other articles also. Article 19 (2) originally provided for restriction of a citizen's freedom of speech and expression by a law relating (among other things) to "any matter which undermines the security of the State". An act endangering "public order" does not necessarily undermine the security of the State. As Article 19 (2) did not include among the restrictions, a law providing for public safety or public order in the State, the Supreme Court, in *Romesh Thappar* v. *Madras* [16] set aside the Madras Maintenance of Public Order Act, 1949, which authorized the Government, for the purpose of the maintenance of public order, to prohibit the entry into the State of Madras, of any document or journal. The decision necessitated an amendment of Article 19 (2).

Another such case which forced a constitutional amendment is *State of Madras* v. *Champakam Dorairajan*,[17] where the Supreme Court held that the Madras Communal Government Order distributing the seats in Government colleges between students of different communities in a fixed proportion, violated Articles 15 (1) and 29 (2) as the order discriminated against the petitioner *only* on the ground of her caste. The Government relied upon Article 46 (Directive Principle) which directs the State to promote the educational interests of the weaker sections of the people, but the Court held that "the Directive Principles of State policy have to conform and run subsidiary to the chapter on Fundamental Rights". The Court thus has interpreted the Constitution in these two cases uninfluenced by considerations of policy, leaving it to the Legislature to fill the lacunae in the Constitution by an amendment.[18]

[16] A.I.R. 1950 S.C. 124.

[17] A.I.R. 1951 S.C. 226.

[18] Other decisions in which the Supreme Court adopted a narrow or literal interpretation of the Constitution are: *Province of Bombay* v. *Advani* (1950 S.C.J. 451); *Orissa* v. *Madangopal* (1950 S.C.J. 764); *Election Commission* v. *Saka Venkata Rao* (1953 S.C.J. 293), etc.

II. The Period of Expansion.

The Advisory Opinion concerning the Delhi Laws Act and two other Acts [18] is perhaps the earliest case in which the Supreme Court has attempted a widening of its powers of review. In the Gopalan case, the Judges were only too conscious of the limitations of the judicial power under the Constitution. Das J. pointed out in that case that " in India the position of the judiciary is somewhere in between the Courts in England and the United States " and that " the Court's supremacy over the legislative authority is confined to the field where the legislative power is circumscribed by limitations put upon it by the Constitution itself." Kania C.J. declared that any assumption of authority by the Courts beyond this " would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights "—words which have proved prophetic indeed in the light of subsequent events.

The question that was considered in *In re. the Delhi Laws Act* [19] was the extent of delegation of legislative power permissible under the Constitution. In England, Parliament being supreme, there is no *legal* limit to its powers of delegation. In America, the Supreme Court has laid down that the essential legislative power, viz., the power to declare the legislative policy and to lay down the standard which is to be enacted into a rule of law, cannot be delegated. The question has been considered in India even before the Constitution, by the local Courts and by the Judicial Committee of the Privy Council; and the judges of the Supreme Court have in the present case, made a detailed comparative study of the views of these eminent tribunals of the different countries. Great reliance has been placed by all the judges on the Privy Council decisions, but as unfortunately contrary interpretations have been made of them

[18] 1951 S.C.J. 527.

[19] 1951 S.C.J. 527.

by the learned judges, a brief survey of them would be helpful for a proper understanding of the present case.

In the earliest case, *Empress* v. *Burah*, [20] the Privy Council denied the applicability of the maxim *delegatus non potest delegare* to the Indian Legislature, because, when acting within the limits imposed upon it in the Constituent Act by the British Parliament, "it has, and was intended to have, plenary powers of legislation, as large and *of the same nature* as those of Parliament itself". This view has been reiterated in subsequent cases also, but an element of confusion has been introduced by certain other passages in the judgments which have been interpreted as qualifying the doctrine of "supremacy within limits" stated above. These passages contain remarks to the effect that the particular delegation of power complained against in the case, consisted not of delegation of legislative power, but one of conditional legislation or subordinate legislation or authority ancillary to legislation, etc. From these Mahajan J. inferred in the present case that all that the Privy Council sanctioned was "delegation of authority ancillary to legislation or delegation to municipal institutions to make regulations and no more". However, Patanjali Sastri J. (as he then was) came to the contrary conclusion that these remarks could not be taken "to qualify in any way the breadth of the general principles so unmistakably laid down" in the earlier passage quoted above. He points out that the Privy Council has sustained delegation of carte blanche powers including that of laying down policies in cases like *Shannon* v. *Dairy Products Board* [21] and *King Emperor* v. *Benoari Lal Sarma*. [22] In *Hodge* v. *Queen*, [23] the Judicial Committee, repelling the petitioner's contention that the Legislature has "effaced itself" pointed out: "It retains its power intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly in its own hands. How far it can seek

[20] 5 I.A. 178.
[21] 72 I.A. 57.
[22] 1938 A.C. 708.
[23] 9 A.C. 117.

the aid of subordinate agencies, and how long it shall continue them, are matters for each Legislature, and not for Courts of Law, to decide ". Thus it is submitted that the only limitation contemplated by the Privy Council as binding the colonial Legislatures is " the creation and arming with general legislative authority a new legislative power " [24] which is not authorized by the Parliamentary enactment which created that Legislature. The Judicial Committee prohibits such *formal* abdication by the Legislature because that would amount to a violation of an express provision of the Constituent Act, which created the colonial Legislature. Any amount of *substantial* abdication by delegation of policy-making power is not forbidden, because under the strict rules of interpretation adopted by the Privy Council (and by our Supreme Court in the Gopalan case), the Court can invalidate a legislative measure for violation only of express provisions of the Constitution and not of what is called the spirit of the Constitution.

Coming to the Indian Constitution, the majority Judges conceded that the doctrine of separation of powers does not apply to India because of the constitutional provisions regarding the responsibility of the Cabinet to Parliament, etc., but adopted the view of Cooley [25] and Baker [26] that there is a constitutional trust, some sacred principle lying at the basis of representative democracy itself, which prohibits the Legislature from delegating to another its essential functions. It is amazing that the same Judges who so decisively rejected the importation of the due process clause into the Indian Constitution in the Gopalan case, and who still uphold the correctness of that decision, should have accepted as the basis of their decision in the present case this remarkable doctrine which is nothing but the hoary natural law dogma dressed up in an American attire, and whose introduction in India is far less justifiable than

[24] Quotation from Burah's case (5 I.A. 178).
[25] " Constitutional Law ", Fourth Edition, page 138.
[26] " Fundamental Law ", Volume I, page 287.

that of the due process clause. In fact, even in America this doctrine does not seem to be applicable to all the legislative acts. Congress may declare an unjust war; it may refuse to recognize a State Legislature and to admit the representatives elected by the State to Congress; [27] it may fail to redistribute constituencies on a proper population basis [28] and thus jeopardise the functioning of representative democracy which is supposed to be the raison d'etre of this doctrine; but the Supreme Court would not interfere with its discretion, as these are all "political questions." [28a] The adoption of such convenient doctrines merely illustrates the tendency of Courts to expand the scope for judicial supremacy—a tendency which became more pronounced in India in decisions subsequent to the present one. [29]

Thus the majority judges adopted the American view that the power of laying down or modifying the policy of an enactment cannot be delegated. [30] It is curious that the learned Judges did not consider in this case whether delegation of legislative power would amount to a violation of any Fundamental Right. However, in subsequent cases it has been held that vesting of unguided discretion in any authority by a legislative enactment in matters affecting the citizens' rights would amount *per se* to a violation of Article 14 (Equal Protection Clause) and Article 19. [31] While these articles thus protect the citizen adequately against the evils of undue delegation of legislative power, it is unfortunate

[27] *Luther* v. *Borden*, 7 How. 1.

[28] *Colegrove* v. *Green*, 328 U.S. 549.

[28a] Besides, the Court failed to see that this doctrine is, in effect, merely the doctrine of separation of powers with the obligation of a trust superimposed on it.

[29] Some of the majority Judges relied upon Article 357 (1) (*a*) to prove that by specifically providing for delegation of legislative power to the President by Parliament in that article, the framers must be deemed to have forbidden delegation in other circumstances. This argument is rejected not only by the minority Judges but also by Bose J., a majority Judge who points out that the clause was introduced to avoid the prohibition in Burah's case against complete abdication by the Legislature.

[30] This view has been confirmed in later cases like *Bagla* v. *State of M.P.* (1954 S.C.A. 824) and *Rajnarain* v. *Patna Administration* (1954 S.C.A. 774), etc.

[31] See e.g., *Dwaraka Prasad* v. *State of U.P.*, A.I.R. 1954 S.C. 229.

that the Supreme Court should have resorted to unsound rules of interpretation and adopted untenable doctrines for effecting that purpose.

The Supreme Court made a bold attempt to curtail legislative authority and to expand the citizen's property rights in a series of four decisions in 1954. [32] Article 19 (1) (*f*) guarantees to the citizen the right to acquire, hold and dispose of property, subject to "reasonable" restrictions in the interests of the public. Article 31 contained several clauses. Clause (1) provided that no person shall be deprived of his property save by authority of law. Clause (2) required that a law authorising the acquisition or taking possession of property should provide for compensation, and either fix the amount itself or specify the manner and principles for determination of the same. Clause (5) is the other important clause in the article. It exempts from the requirements of clause (2), pre-constitutional laws and also laws imposing taxes or penalties, laws for the promotion of public health or the prevention of danger to life or to property and laws implementing agreements with other States regarding the property of evacuees.

Thus Article 19 is broad in scope and leaves it to the judiciary to evolve principles for harmonising the rights of the citizen with the interests of the State. But this trust in the judiciary seems to have been lost when the framers proceeded to Article 31 which demarks the sphere of eminent domain in Indian law. Considerable difficulty has arisen in the interpretation of the provisions of this article. Besides a proper correlation between the two articles has yet to be made and seems very difficult, as there is considerable overlapping between the two. In *State of West Bengal* v. *Subodh Gopal* [33]Patanjali Sastri C.J. offered a solution to

[32] Considerations of space forbid an analysis of other decisions in which the Supreme Court has attempted a wide review (e.g.), *State of Madras* v. *C. G. Menon* (A.I.R. 1954 S.C. 517), *Mohta* v. *A. V. V. Sastri* (A.I.R. 1954 S.C. 545), *Himmatlal* v. *State* (A.I.R. 1954 S.C. 403), etc.

[33] A.I.R. 1954 S.C. 92.

the effect that Article 31 deals with the concrete property rights, while Article 19 (1) (*f*) provides merely for an abstract right—the right to *own* property and not to the property *owned*. Apart from the technical objection that all rights are necessarily abstract only, this argument would practically reduce Article 19 (1) (*f*) especially the right " to *hold* and *dispose of* property " to meaninglessness. Anyhow this distinction between concrete and abstract rights has been rejected by the Supreme Court in a later case, *Hindu Religious Endowments* v. *Lakshmindra.* [34] The usual practice for Courts so far has been, to apply Article 31 if the case is clearly one of eminent domain, but in marginal cases, to test the validity of the impugned act under both the articles. [35]

Regarding Article 31, Das J. had held in *Chiranjit Lal* v. *Union of India* [36] that clause (2) imposed the requirements of compensation on two kinds of deprivation only, viz., acquisition of ownership and transfer of possession or requisition and that clause (1) authorized all other kinds of deprivation with no limitation except that of authorization by law. This literal interpretation of the article was however categorically rejected by the majority of the judges in *Subodh Gopal's case* and in *Dwarkdas* v. *Sholapur Spinning Company* [37] on the ground that " it stultifies the very conception of the right to property as a fundamental right " (Sastri C.J.). They held that clauses (1) and (2) covered the same ground, " the deprivation contemplated in clause (1) being no other than the acquisition or taking possession of the property referred to in clause (2) ". They further held that the terms ' acquisition ' and ' taking possession ' in clause (2) taken together implied " such an appropriation of property or such substantial abridgment of the rights of ownership, as would amount to a deprivation

[34] A.I.R. 1954 S.C. 282.
[35] *See*, e.g., *State of Rajasthan* v. *Nathmal* (1954 S.C.A. 347) and *Saghir Ahmed* v. *State of U.P.* (A.I.R. 1954 S.C. 728).
[36] A.I.R. 1951 S.C. 41.
[37] A.I.R. 1954 S.C. 119.

of the owner of his property". This construction led them to adopt the American test that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a 'taking'" and has to be compensated. The Court's interpretation is, if one may say so with respect, remarkable for its originality, but it violates all normal canons of constitutional construction. The framers have meticulously specified the two cases of compensable deprivation in clause (2) and to extend the ambit of its protection to all classes of deprivation is to go against the plain letter of the law. The argument that the literal interpretation makes a mockery of the fundamental right to property would at best provide a plea for the amendment of the article, but is legally irrelevant.

In *State of West Bengal* v. *Bella Banerjee* [38] the Court took the logical step forward for enlarging the property-right and held in a very short judgment which belied its momentous consequences, that the word 'compensation' in Article 31 (2) meant "a just equivalent of what the owner has been deprived of," and that hence the adequacy of compensation was not to be left to the complete discretion of the Legislature but was justiciable. Due process of law which was summarily rejected in Gopalan's case as inapplicable in the field of personal liberty was thus ushered in ceremoniously by these decisions in the domain of property rights.

Prima facie, the Court's interpretation of the word 'compensation' in the Bella Banerjee case looks unexceptionable, but in view of the constitutional amendment precipitously brought in by the Government consequent on this decision, the question arises whether the intention of the framers of the Constitution was really to make adequacy of compensation justiciable.

Prof. Alexandrowicz has in an article drawn attention to the fact that the Constituent Assembly deliberately did not use the adjectives 'just' and

[38] A.I.R. 1954 S.C. 170.

'adequate' to qualify the word 'compensation' in Article 31 (2).[39] Pandit Nehru, who introduced the article in the Assembly, Sir Alladi Krishnaswami Iyer and other spokesmen expressed their conviction that the word 'compensation' by itself could not mean adequate or just compensation, and that under the Article, the judiciary can interfere with the determination of the quantum of compensation by the legislature, only in cases of fraud or abuse of power. Mr. Nehru in this connexion referred to the pledge of the Congress Party to bring about agrarian reform. Counsel for the Government in the Banerjee case did not cite these speeches probably because of the rule that debates in the Legislature are not admissible as aids of interpretation, even in cases of latent ambiguity.[40]

The last of the four cases which necessitated constitutional amendment was *Saghir Ahmad* v. *State of Uttar Pradesh.*[41] The question under consideration in that case was whether 'restriction' in Article 19 (clauses 2 to 6) includes 'prohibition'. This had been answered in the affirmative (though with qualifications) by the Supreme Court in two earlier cases —*Cooverjea Bharucha* v. *Excise Commissioner*[42] and *M.B. Cotton Association, Limited* v. *Union of India*[43]; but surprisingly, in this case, the Court voiced its doubts about the proposition, though it left the question open for future decision. If restriction is not to include prohibition, compensation would have been payable under Article 31 (2) even in cases of regulation of rights by the Legislature in exercise of what is called in America the "police power". Another pronouncement of the Court in the present case was more astonishing.

[39] "Admissibility of Constituent Assembly Debates in aid of Interpretation of the Constitution", "Lawyer", October 1955, page 19.

[40] Prof. Alexandrowicz in the above article, contrasts the judicial approach in the present case with the resort to preparatory material by the Judges in the Gopalan case to explain the absence of the due process clause in Article 21, even though there was no ambiguity in that article, and pleads for adoption of consistent methods of interpretation by the Court.

[41] A.I.R. 1954 S.C. 728.

[42] A.I.R. 1954 S.C. 220.

[43] A.I.R. 1954 S.C. 634.

Article 19 guarantees among other things [by clause (g)], the right to carry on any occupation, trade or business, and was amended in 1951, so as to provide for nationalization of any trade, business or industry by the State as an exception to such right. Article 301 provides that commerce and intercourse throughout the territory of India shall be free. This corresponds to section 92 of the Australian Constitution which has been interpreted by the Privy Council as guaranteeing the right of individuals to trade. However, as under the Indian Constitution, Article 19 (1) (*g*) guarantees this individual right, it is plain that Article 301 covers only the right to the free passage of persons and goods within or without the States. Evidently Parliament took this commonsense view when it amended Article 19 (1) (*g*) only and not Article 301 also to provide for nationalization. But, in the present case, the Court raised the unnecessary query (though it did not give its final opinion on it) whether nationalization cannot be questioned as violating the individual right to trade under Article 301, though it would not be possible to do so under Article 19. The decision thus typifies the hostile attitude of the Court to any curtailment of fundamental rights by the legislature and forced a needless amendment of Article 301 by Parliament.[44]

The Constitutional Amendment—

Consequent upon the above four decisions, Parliament enacted the Constitution (Fourth Amendment) Act in 1955. Adequacy of compensation has been made non-justiciable in the new clause (2) of Article 31 and compensation is specifically restricted to the two instances of " transfer of ownership or right to possession of any property to the State ", and even regarding these two categories, several exceptions have been introduced with a view to provide for economic reforms especially on the agrarian side. A new Article 305 has been introduced to provide for nationalization as an

[44] The amendment is embodied in Article 305.

exception to Article 301. A law can be questioned under Article 31 (2) now only if the compensation provided is wholly illusory and not merely inadequate. The Amendment Act was passed by Parliament with an overwhelming majority, only one member voting against the measure in the Lok Sabha. The Act indeed seems to symbolise a crushing defeat for the Supreme Court and the doctrine of Judicial Review in India. And critics were not wanting to point an accusing finger at the Court, the most prominent among them being the Prime Minister himself. He attacked the decision of *Dwarakdas* v. *Sholapur Spinning and Weaving Mill*[45] [where an Ordinance which provided for the vesting of management of the respondent-company in some Government-appointed directors superseding the elected directors, was set aside under Article 31 (2)] and charged the Court with having handed over the company on a platter to the same directors who had mismanaged its affairs and brought ruin on it. In fairness to the Court, it should be pointed out that in the above case, the decision to set aside the Ordinance under Article 31 (2), was approved, though for different reasons, even by Das J., who disagreed with the majority Judges' interpretation of clauses (1) and (2), and who, in fact, pointed out that the company under the supervision of the Government-nominees was running at a loss for consecutive years. In the matter of choice of an administrator as between the 'corrupt' capitalist and the 'inefficient' bureaucrat, equity certainly lies, in spite of ministerial admonitions, with the former, when the property to be administered is his own!

If the Supreme Court in the Bella Banerjee case went wrong in interpreting the Constitution, the least that should be said in its favour is that it had every provocation to go wrong. If the quantum of compensation under clause (2) of Article 31 was intended by the framers to be left to the final discretion of the Legislature,

[45] A.I.R. (1954) S.C. 119.

the elaborate enumeration of different kinds of laws and Bills in clauses (4) and (6) as exceptions to clause (2), might well have been dispensed with, as these Acts and Bills did provide for some compensation and hence satisfied the requirements of clause (2) as interpreted by Mr. Nehru in the Constituent Assembly. [46] Was the Assembly not sure of its own mind when it drafted the Article? Certain other facts would also seem to lead to that conclusion. Thus Parliament enacted in 1951, the Constitution (Second Amendment) Act, which introduced Articles 31-A and 31-B, with a view to offset the decision in *Kameshwar Singh* v. *State of Bihar*. [47] But the Patna High Court had, in the same decision, categorically held that compensation in Article 31 (2) meant just compensation. This view had also been taken by the Calcutta High Court in *W.B. Co-operative Society* v. *Bella Banerjee*. [48] Since Parliament at that time consisted merely of the members of the erstwhile Constituent Assembly, if those members really disagreed with the view of the Patna High Court on the question of adequacy of compensation, and considered it as opposed to the intentions of the Constituent Assembly, they would have amended Article 31 (2) also then itself. [49] The inference may well be drawn that the members of the Constituent Assembly and the leaders of the majority party (Congress Party) there, were not quite convinced about the wisdom of the policy of excluding judicial review on the question of adequacy and thus converting the Fundamental Right of persons to property in Article 31 into a Fundamental Right of the State to confiscate property.

[46] *See* supra, page 135.

[47] A.I.R. (1951) Pat. 91.

[48] A.I.R. (1951) Cal. 111.

[49] What is still more peculiar is that the original Constitution (Fourth Amendment) Bill introduced by the Government in 1955, merely provided for certain additional exceptions to Article 31 (2), and that the amendment of clause (2) regarding adequacy of compensation was not contemplated by the Government but introduced only subsequently by the Select Committee. Evidently Mr. Nehru, who had opposed judicial determination of the adequacy of compensation at the Constituent Assembly had now no objection to such determination (under the Bella Banerjee ruling) in cases other than those specified in the Amendment Bill introduced by him.

In fact, in spite of the attenuation of Fundamental Rights, the Constitution of 1950 bears the impress of a liberal, tolerant and individualistic philosophy which is partly Gandhian but is certainly not Marxist in character. If the socialistic pattern which has of late become an article of faith in Indian politics, had its roots in the Constitution, they are indeed very carefully hidden. As Sir Ivor Jennings shrewdly pointed out in 1952, the Chapter on Directive Principles " Part IV of the Constitution expresses Fabian socialism, *without the socialism,* for only ' the nationalization of the means of production, distribution and exchange ' is missing[49a]. " There is certainly nothing in any of the Directive Principles including clauses (*b*) and (*c*) of Article 39 or any other provision of the Constitution which is inherently inconsistent with the maintenance of private enterprise or protection of property rights[49b]. On the other hand, Article 19 (1) (*f*) is unequivocal in its guarantee of private property.

Thus when the Supreme Court was faced with the task of choosing between a literal interpretation of Article 31, which would result in a virtual abdication of its powers in favour of the Legislature, and a liberal interpretation of the same, which would stabilize the right to property justifying its appellation as a fundamental right, it could derive no ' internal ' guidance from the Constitution for rejecting the latter course. Hence when it adopted the canon of construction in favour of the citizen's rights it could not be said to be laying itself open to the charge of committing any juristic error.

On the other hand, in a sense it was only following the precedents set by other eminent judicial tribunals. The history of judicial review in several countries with written constitutions reveals a constant attempt by the Courts to assume the position of an arbiter between the

[49a] " Some characteristics of the Indian Constitution ", page 31.

[49b] In fact in *Saghir Ahmed* v. *State of Uttar Pradesh,* the Supreme Court relied upon a directive principle in Article 39 (*a*) as an argument *against* the reasonableness of a nationalization measure.

Legislature and the citizen in the matter of regulating individual rights and thus to assert and expand its supremacy over the Legislature wherever possible, irrespective of the intentions of the framers of the Constitution. The role played by the American Supreme Court as a sort of third chamber of the Legislature under the due process clause is too well known. Not so well known is the fact that the Privy Council has by a strained interpretation of the British North America Act upset the federal balance in Canada in a manner completely contrary to the intentions of the framers. In Australia, where the procedure for amendment is very rigid, the High Court, in considering the validity of Commonwealth laws " with respect to " subjects like defence, immigration, etc., has gone into the question whether the contents of the law were " reasonable or reasonably necessary ". This might be the thin end of the wedge of due process in Australia. Sir John Latham indeed expresses the view that " it may hereafter be argued that the decisions . . . provide ground for arguing that a Commonwealth law cannot be valid unless the Court by which its validity is to be determined is satisfied that it is reasonably necessary in order to deal with such facts as are proved in evidence before the Court." [49c] Besides section 92 of the Australian Constitution guaranteeing freedom of inter-State Commerce, which was introduced by the framers solely with a view to " reinforce the conversion of six separate economic units into one and ensure the operation therein of the contemporary concept of free trade," [50] has been interpreted by the Privy Council as providing for the individual right to engage in trade and consequently as prohibiting nationalization by the State of businesses like banking and air transport.

Compared to the enormity of the perversion of the original constitutional purpose by these tribunals, the

[49c] " Interpretation of the Constitution " in Essays on the Australian Constitution at page 22.

[50] See " Trade, Commerce and Intercourse " by Mr. P. D. Phillips in Essays on the Australian Constitution, page 239 at 243.

attempt of the Indian Supreme Court to enlarge the scope of Article 31 would seem to be but a minor deviation from proper canons of constitutional construction. But while those Courts have been allowed a free hand to evolve the Constitution according to their own lights, it has become almost a habit in India to reverse inconvenient decisions by constitutional amendments before the ink on them becomes dry. The reason is not far to seek. The judicial interpretation of a Constitution necessarily benefits some classes of the population and if the vested interests so created are numerically in the majority or provided the amendment procedure is rigid, even if they form a sufficient minority, alteration of the Constitution becomes impossible. Thus in Canada, the Provinces whose legislative powers are widened as a result of the Privy Council decisions, have successfully resisted amendment of the British North America Act. Similarly the extreme regidity of the amendment procedure in Australia has resulted in a marked expansion of judicial review in that country.

In India, on the contrary, the chapter on Fundamental Rights might be amended by a two-thirds majority in Parliament, and the ruling party has been having an overwhelming majority in Parliament. But there is another and far more important reason for the dethronement of property rights in India. The have-nots and the have-nothings (if one may say so) far exceed the haves in number in this country, and the introduction of adult franchise by Article 326 of the Constitution has resulted in the transfer of ultimate political control to the "man in the street", who is perhaps more interested in the distribution of property than in the acquisition of it. Thus while Socialism has had to fight a battle for survival with other competing ideas in favour of security of property in richer countries with the Parliamentary system of democracy, it has been adopted, almost overnight, by all the parties in India as the political and economic goal. Thus Article 326 has proved to be the most crucial provision,

having the potentiality of changing the whole face of the Constitution. It has already aided in reducing Articles 19 (1) (*f*) and 31 to valuelessness. It was unfortunate that the ruling party in the Constituent Assembly did not foresee fully the implications of adult franchise for property rights in India, and provided for a guarantee of these rights in the Constitution; for the Supreme Court had to pay the penalty for taking such guarantee too seriously by having its decisions reversed by a constitutional amendment.

III. The Period of Retreat.

The consequence of repeated constitutional changes has been unfortunate in more directions than one. The Constitution has lost its so-called ' sanctity '. There is no certainty or immutability about its provisions; there is nothing of that purposefulness or positive sense of direction above the passing conflicts of the day, which is after all one of the chief values of a written constitution. At its worst days of expansionism, a Judge of the American Supreme Court once declared that the Constitution is what the Supreme Court says it is. The Constitution in India now seems to be what the Legislature says it is.

There is a marked unwillingness on the part of the Executive and the Legislature to trust matters to the discretion of the Courts if it can be avoided. Witness the latest constitutional amendment, the Sixth Amendment Act, 1956, which transfers the judicial power under the Constitution to " formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or Commerce " to Parliament. No wonder judicial review is perhaps at its lowest ebb now in India. We do not find now any evidence of that robust assertiveness, that determination to fashion the Constitution on the American model which was characteristic, say, of the judgments of Mahajan

C.J. who was Marshallian in his ambition to expand judicial power in India.

The Fourth Amendment Act, 1955, affected Article 31 only but not Article 19 (1) (*f*); hence we find in recent litigation a forlorn reliance placed upon the latter article by parties especially landlords who have been grievously affected by the recent spate of 'land reform' legislation in several States. However the attitude of the Courts has been one of self-abnegation and of deference to the legislative finding as to the need for such reforms. Fixation of fair rent even with retrospective effect, a ceiling on personal cultivation, etc., have been upheld as constituting a 'reasonable' restriction on the landholder's right to hold property under Article 19 (1) (*f*). These legislative measures are intended only as a preliminary step to laws providing for fixation of a ceiling on ownership of land and for deprivation of the surplus lands above the limit fixed. The Courts are spared from the trouble of considering the reasonableness of such laws also, by Articles 31-A (1) (*a*) and 31 (2) (as amended).

In a recent case *Sundararaja Iyer* v. *Sub-Collector of Dindigul* [51] concerning the validity of an Act protecting tenants from eviction, the Madras High Court took into account as a relevant factor for considering the reasonableness of the law, "the economic pattern envisaged by the two Five-Year Plans". The Court also held that prohibition of resumption of the right of cultivating his own lands by the landlord did not constitute a restriction on his right to carry on business as an agriculturist under Article 19 (1) (*g*), "because he can still carry it on provided he can acquire land on which to do so". And the Rajasthan High Court has held that statutory fixation of one-sixth of the produce as the rent payable to the landlord is a fair and reasonable restriction in the interests of the tenantry which forms the vast

[51] 70 L.W. 221.

majority of the population in the State and *hence* in the interests of the general public [52]

Socialism or Marxism might well require that the landlord's rights regarding his land should be progressively restricted and finally abolished. But Marx would not have said that under his system the landlord has a right to 'property' or that the right is 'reasonably' restricted. Socialism simply denies the landlord his right to property. Unfortunately the Courts cannot concede this straightforward argument because while Parliament amended Article 31 so as to enable nationalization of land, it forgot to repeal or amend Article 19 (1) (*f*). The Supreme Court has tried to find a way out of the dilemma by holding that "the fundamental right which a citizen has, to hold and enjoy property imports only a right to recover reasonable rent when the lands are cultivated by a tenant and therefore a legislation whose object is to fix a fair and equitable rent cannot be said to invade that right". [53] Thus the landlord is, in effect, outlawed from the pale of fundamental rights. This view is completely opposed to that taken by the Supreme Court in *State of Bihar* v. *Kameshwar Singh* [54] and *State of West Bengal* v. *Subodh Gopal* [55], which recognized the substantive rights of property of the landlord. But if the Court adheres to the earlier view, and goes into an independent assessment into the reasonableness of the restrictions, it would be plainly contravening the policy behind the constitutional amendment, viz., to bring about agrarian reforms irrespective of the fundamental rights.

It remains to be seen how the Supreme Court would interpret Article 19 (1) (*f*) and (*g*), when the State decides to extend the implementation of its socialistic

[52] *Raj Sahiban Sher Singh* v. *Rajasthan* A.I.R. (1954) Raj. 65.

[53] *Kishan Singh* v. *Rajasthan State* A.I.R. (1955) S.C. 795. It should be noted that the Court holds, not that the landlord's right under Article 19 (1) (*f*) is reasonably restricted, but that the right itself is merely to receive what the Legislature has fixed as the fair rent.

[54] A.I.R. (1952) S.C. 252.

[55] (1954) S.C.R. 587.

ideology from the agrarian to other fields of property also. Would the Court examine the reasonableness of the restriction in each case objectively? It is obvious that Article 19 (1) (*f*) and (*g*) are based upon a philosophy which is not consistent with Socialism.

India, which has advocated co-existence between socialistic and capitalistic countries in the international field might well succeed in evolving a mixed economy combining Socialism with private enterprise. But in that event, the demarcation line between the two would necessarily have to be laid by the Executive or the Legislature and not by the Courts, as it is an essentially arbitrary line based upon policy. The British experience shows that Socialism might co-exist with democracy in a country. But it is obvious that Socialism cannot afford to tolerate judicial review, at any rate, in the field of property rights. If the powers that be, decide upon the ushering in of the socialistic panacea, would it not be better to stop pretending that we have a Fundamental Right to property in India and to repeal clauses (*f*) and (*g*) of Article 19 (1), so that Courts might be saved of the embarrassment of having to resort to the aid of reports of Executive Commissions and Planning Bodies, if not of party manifestos also, for interpreting the right to property as the right to have it destroyed?

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MADRAS: PRINTED BY THE SUPERINTENDENT, GOVERNMENT PRESS—1957.